91-1452

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1991

CHICAGO TRIBUNE COMPANY,
an Illinois Corporation,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

DOUGLAS A. DARCH*
CLARENCE T. POLLARD
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

*Counsel of Record

QUESTIONS PRESENTED

I. May the National Labor Relations Board order that an employer bargain with a union that has demonstrated a propensity to engage in invidious racial discrimination merely because it has been certified as the exclusive bargaining representative of the employees?

II. May a United States Court of Appeals enforce an order entered by an administrative agency based on materials which the agency gathered *ex parte* and which the agency has decided should not be of record?

STATEMENT REQUIRED BY RULE 29.1

Chicago Tribune Company is a wholly owned subsidiary of Tribune Company. Tribune Company has no parent company. Excluding wholly-owned subsidiaries, Chicago Tribune Company has an ownership interest only in "City News Bureau of Chicago," an Illinois corporation.

Parties Below

The parties in the proceeding before the United States Court of Appeals for the Seventh Circuit were the Chicago Tribune Company, the National Labor Relations Board, and the International Brotherhood of Electrical Workers Union, Local No. 134, AFL-CIO.

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Petition For A Writ Of Certiorari
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For The Seventh Circuit

OPINIONS BELOW

This petition seeks review of the Decision and Order of a panel of the United States Court of Appeals for the Seventh Circuit, which are together reported as *NLRB v. Chicago Tribune Company*, 943 F.2d 791 (7th Cir. 1991) and are reproduced in the Appendix to this petition (A1-A13). The court's order granting the Chicago Tribune Company's (the Company's) Motion for Rehearing and denying the relief requested in that Motion (which is unreported) is reproduced in the Appendix (A16-A17). The court's unreported denial of the Company's Motions to Take Judicial Notice of the Affidavit of Joseph Duffy is reproduced in the Appendix (A14-A15). The opinion of The National Labor Relations Board (the Board) granting summary judgment against the Company is reported at 298 N.L.R.B. No. 162, and is repro-

duced in the Appendix (A21-A28). The Report on Objections issued by the Board's Acting Regional Director is reproduced in the Appendix (A33-A55). The Board's decision adopting the Acting Regional Director's Report is unreported, but is reproduced in the Appendix (A31-A32). The Board's orders denying Reconsideration are unreported, but are also reproduced in the Appendix to this petition as (A20) and (A29-A30), respectively.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit issued on September 24, 1991. On December 9, 1991, the court granted the Company's Petition for Rehearing, but entered an order denying the relief sought in the Petition. This petition is, therefore, timely under 28 U.S.C. § 2101(c). Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

A. Constitutional Provision

U. S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutory Provisions

5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or to personal or public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substances of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and

purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

29 U.S.C. § 158(a)(5)

Unfair labor practices by employer. It shall be an unfair labor practice for any employer—

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a) [29 U.S.C. § 159(a)].

29 U.S.C. § 159(a)

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions or employment: provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(c)(1)

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a sub-

stantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 160(e)

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

C. Regulations

29 CFR § 102.69(d)(1991)

In issuing a report on objections or challenged ballots, or both, following proceedings under §§ 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under § 102.67, the regional director may act on the basis of an administrative investigation or upon the record of a hearing before a hearing officer. Such hearing shall be conducted with respect to those objections or challenges which the regional director concludes raise substantial and material factual issues.

29 CFR § 102.69(g)(1)(ii)(1991)

In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report on objections or on challenged ballots and any exceptions to such a report, any regional director's decision on objections or challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (g)(3) of this section.

29 CFR § 102.69(g)(3)(1991)

In a proceeding pursuant to this section in which no hearing is held, a party filing exceptions to a regional director's report on objections or challenges, a request for review of a regional director's decision on objections or challenges, or any opposition thereto, may support its submission to the Board by appending thereto copies of documentary evidence, including copies of any affidavits, it has timely submitted to the regional director and which were not included in the report or decision. Documentary evidence so appended shall there upon become part of the record in

the proceeding. Failure to timely submit such documentary evidence to the regional director, or to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent related unfair labor proceeding.

STATEMENT OF THE CASE

This case presents two recurring questions. Both raise significant statutory and constitutional concerns.

The first question is whether the Board may order an employer to bargain with a union which practices invidious racial discrimination merely because it has been certified as the exclusive bargaining representative of a bargaining unit of employees. The Seventh Circuit's resolution of this question conflicts with the decisions of the Fifth, Eighth and District of Columbia Circuits, and with earlier decisions of this Court.

The second question involves the role of a reviewing court in a proceeding under Section 706 of the Administrative Procedure Act. Specifically, may a court enforce an agency (Board) order based upon materials which the Board obtained *ex parte* and which the agency has decided should not be of record? Or, to restate the question, may an agency adopt a regulation which precludes the reviewing court from examining the "whole record" as mandated by a federal statute? The Seventh Circuit's resolution of this question conflicts with the decisions of the Fourth, Fifth, Sixth and Ninth Circuits, and with the earlier decisions of this Court.

The Company prints a newspaper in the Chicago area. Its newspaper printing facility is technologically sophisticated and state-of-the-art, incorporating the latest advances in automation and electronics.

For approximately forty years preceding the events herein, the Company obtained electricians through a referral arrangement

with the International Brotherhood of Electrical Workers Union, Local No. 134 (hereinafter "Local 134"). Local 134 is an amalgated local and issues its members credentials ostensibly based upon their skill levels and job duties. Historically, the Company's electricians were either "A" journeymen, "B" journeymen, or permit workers. Under Local 134's rules, permit workers were allowed to work only for the company at which the permit was issued, while A journeymen and B journeymen could transfer to other employers with their union-issued credentials intact.

For many years the Company hired non-credentialed electricians for entry level positions, who then were issued work permits by Local 134. Following a one-year period of on-the-job training, these employees were issued B journeyman credentials. Because of the technological complexity of the Company's press equipment, this practice became impracticable and imprudent. Consequently, in 1986 the Company instituted a four-year apprenticeship program of its own to train maintenance electricians. The Company hired three employees in April 1986 as its initial apprenticeship class.

When these individuals were hired, Franz Perfect, a Company supervisor, contacted Joseph Duffy, Local 134's Business Agent. The affidavit of this supervisor (which is in the record in this case) establishes:

> 1. that Local 134 Business Agent Duffy said that there was "no such thing as a B apprentice in Chicago";
>
> 2. that Business Agent Duffy said that the three employees would be issued B permits; and
>
> 3. that Business Agent Duffy said that the three employees would remain "permit workers" until they completed the Company's apprenticeship program (i.e., for the next four years).[1]

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[1]Perfect's affidavits appear at pp. 13-25 of the Joint Appendix filed by the parties in the proceeding below, *NLRB v. Chicago Tribune Co.*, 943 F.2d 791 (7th Cir. 1991) (hereinafter "Seventh Circuit Joint Appendix").

The three employees were issued permits in 1986 and matters remained in this posture until the Board election in October 1988. In August 1988, shortly before the election, these three employees were issued B apprenticeship cards. The details surrounding the issuance of these cards are summarized in the Acting Regional Director's Report on the Company's Objections, in which the Acting Director concluded that, following a union organizing meeting, the cards were issued by Local 134's Executive Committee "no questions asked." (Local 134's Executive Committee's practice of circumventing the normal procedure for issuing union credentials will be discussed further below.)

On October 8, 1988, the Board conducted a representation election for the Company's electrical workers. These employees selected Union representation. The results of this election would have been reversed had only *six* individuals changed their votes.

The Company filed timely objections to the election, asserting that Local 134's conduct during the critical period before the election was objectionable and therefore required that the election be set aside. In support of its objections, the Company presented evidence by way of witnesses or affidavits that Local 134 provided benefits in the form of union credentials to three employees (the three apprentices discussed above); that Local 134's agents threatened employees by telling four of them that they would be "blackballed" if Local 134 did not win the election; and that the union's constitution required the employees to forfeit their union pensions if Local 134 lost the election (some of the Company's electricians had been longstanding Local 134 members).

The Acting Director conducted an investigation into these and other allegations. The Acting Director did not interview those individuals who had submitted affidavits, but he did interview the witnesses provided by the Employer. In addition, however, the Acting Director conducted an *ex parte* investigation. The contents of this investigation were purportedly summarized in the

Acting Director's decision. It is of great significance to this case, however, that the underlying documents themselves are not of Record.

Based upon the results of his *ex parte* investigation, the Acting Director determined that there were no substantial and material factual issues requiring a hearing. He therefore overruled the Company's objections. The Company then filed a request for review of the Acting Director's decision. The Company attached to its request "the documentary evidence, including copies of affidavits, that *it [had] timely submitted* to the Regional Director" as required by Section 102.69(g)(3) of the Board's Rules and Regulations (emphasis supplied). *See* 29 CFR § 102.69(g)(3). Obviously, the Employer did not submit the affidavits that the Acting Director had obtained *ex parte,* as the Employer did not even know the identities of the affiants.

In June, 1989, the Board adopted the Acting Director's findings, accepted his recommendations, and certified Local 134 as the unit employees' bargaining agent.

The Company then refused to bargain in order to test certification. In response to the General Counsel's Motion for Summary Judgment on the § 8(a)(5) refusal to bargain charge, the Company presented extensive evidence showing that Local 134 had long demonstrated a propensity to engage in invidious racial discrimination against blacks and Hispanics. Because of these repeated acts of racial discrimination, the Company argued that the Board lacked the authority to order the Company to bargain with Local 134. The Board, however, granted the General Counsel's Motion and ordered the Company to bargain.

In October, 1990, the Company filed a petition for review with the United States Court of Appeals for the Fifth Circuit, and the Board simultaneously filed an application for enforcement of its order with the U.S. Court of Appeals for the Seventh Circuit. The

Company's petition was transferred to the Seventh Circuit and was ultimately consolidated with the Board's application. In December, 1990, the Company filed a Motion for Supplementation of the Record that the Board had forwarded to the Seventh Circuit. The substance of this motion was that the statements of several witnesses that the Acting Director had clearly relied on in his decision as to facts that were both significant and material had been improperly omitted from the Record transmitted to the court.

In June, 1991, the Company filed a copy of an affidavit tendered by (now former) Local 134 Business Agent Joe Duffy in *Ridgeway v. Local 134, et al.,* No. 74-C-3045 (U.S.D.C. N.D. Ill.), a Title VII action brought against Local 134 on behalf of blacks and Hispanics. Judge Nicholas Bua presided over this case. Duffy's affidavit was attached to plaintiff Ridgeway's motion to hold Local 134 in contempt for violating the terms of a court-approved settlement agreement. In this affidavit, Duffy discussed a program developed by Local 134's officers to circumvent the district court's affirmative action order, stating that:

> I learned that this new procedure for issuing credentials was devised by some of the Local's officials to avoid the Local's obligations under the *[Ridgeway]* settlement agreement. It was referred to by these officials as the "Beat Bua" program.[2]

Although the Seventh Circuit entered an order in the instant case denying the Company's Motion for the court to take judicial notice of Duffy's affidavit, the court nonetheless makes reference

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[2]The new procedure for issuing credentials was for Local 134's Executive Board, instead of its Seniority Board, to issue credentials. This was the same procedure followed in this case when Local 134 issued the three apprentices the theretofore non-existent "B" apprenticeship cards.

Duffy's 1991 affidavit reiterated the substance of two charges that he had filed with the Board in 1988 against Local 134. *See* Seventh Circuit Joint Appendix at pp. 35, 36.

to the contents of this affidavit in its decision. *See* 943 F.2d at 798 (A12) (noting, in discussing the *Handy Andy* issue, the Company's allegation that Local 134 "has attempted to disobey court orders").

The Seventh Circuit's opinion ordering enforcement of the Board's bargaining order and denying the Company's petition issued September 24, 1991. In sum, the court found that the Board had properly denied the Company an evidentiary hearing on its allegations of objectionable pre-election conduct by Local 134 because substantial evidence supported the Board's determinations that the Company did not present a *prima facie* case for setting aside the election. *See* 943 F.2d at 797 (A10-A11).

In making this determination, the court relied exclusively on the Acting Director's summary of his *ex parte* investigation. *Id.* at 795-97. Indeed, as the documents gathered by the Acting Director were not of record, there was nothing else for the court to review. The court also rejected the Company's position that the Board could not certify Local 134 because it practiced invidious racial discrimination. In the court's view, under the authority of *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), there was no bar to Local 134's certification because the Company had proffered no evidence showing that any alleged discrimination by Local 134 had "related" to the pre-election campaign or to the election itself. *See* 943 F.2d at 798 (A11-A12).

In December, 1991, the court, by separate Order, granted the Company's request for a rehearing. Simultaneously, however, the court ruled that the Company's arguments about the contents of the record on review were untimely because they should have been raised before the Board (A16-A17).

On February 14, 1992, the court denied the Company's Motion to Stay Mandate (A56-A57). This Petition ensued.

The jurisdiction of the United States Court of Appeals for the Seventh Circuit over this matter was granted by Sections 10(e)

and (f) of the National Labor Relations Act. 29 U.S.C. § 160(e) and (f). The Board's jurisdiction was granted by Sections 2, 8, 9 and 10(a) of the National Labor Relations Act. 29 U.S.C. §§ 152, 158, 159 and 160(a).

REASONS FOR GRANTING THE WRIT

This case presents two issues that implicate both substantive and procedural dimensions of the administration of the National Labor Relations Act.

The first issue requires the Court to determine whether the Board (an agency of the federal government) may order that an employer bargain with a union which practices invidious racial discrimination merely because that union has been certified as the exclusive bargaining representative of the employees.

The Seventh Circuit's decision embracing the Board's decision in *Handy Andy* that invidious discrimination is not a bar to exclusive representative status flatly conflicts with the decisions of the Fifth, Eighth, Ninth, and District of Columbia Circuits. More fundamentally, the resolution and elimination of this conflict is a matter of critical importance, for, until reversed or set aside, the Seventh Circuit's decision extends the court's *imprimatur* on the invidious discrimination which the court itself has recognized to be endemic to some of Chicago's labor unions. *See Daniels v Pipefitters' Ass'n. Local No. 597*, 945 F.2d 906, 909 (7th Cir. 1991) (noting that the "backdrop of this case of individual racial discrimination is the historic resistance within the building trades in the Chicago area to accepting racial and ethnic minorities into their ranks"). Furthermore, the invidious effects of racial discrimination can spread only if local unions are able to expand their representation status to cover unrepresented employees—a process which depends upon certification by the Board *and* the *judicial* enforcement of any resulting bargaining order.

The second issue presented by this Petition involves a more fundamental aspect of the administration of the Act. Specifically, the question presented is whether it is the courts or the Board which will determine the reach of the phrase "whole record or those parts of its cited by [the agency]" appearing in Section 706 of the Administrative Procedures Act ("APA"). Here, the Board promulgated a rule, Section 102.69(g)(1), that excluded from the record before the Board the evidence that the Acting Regional Director had gathered *ex parte* and relied upon to adjudicate the Company's election objections. Under this Rule, the Board then submits to the court only the evidence "of record" that it actually reviewed, thereby shielding the correctness of its decisions from judicial review.

The decision of the Seventh Circuit giving effect to this internal Board procedure directly conflicts with the decisions of the Fourth, Fifth, Sixth and Ninth Circuits and the earlier decisions of this Court. The resolution of this question has nationwide import to the enforcement of the National Labor Relations Act. Each and every case involving objections to a Board-conducted election must directly confront the Board's failure to submit to the reviewing court the record on which it relied. But as observed by one court: "allowing administrative agencies to preclude judicial access to materials relied upon by an agency . . . would make a mockery of judicial review." *Smith v. FTC*, 403 F.Supp. 1000, 1008 (D. Del 1975).

I. THE SEVENTH CIRCUIT'S DECISION THAT THE RACIALLY DISCRIMINATORY PRACTICES OF A UNION DO NOT PRECLUDE THE BOARD FROM ORDERING AN EMPLOYER TO BARGAIN WITH THAT UNION BECAUSE IT HAS GRANTED THAT UNION EXCLUSIVE BARGAINING REPRESENTATIVE STATUS CONFLICTS WITH PERTINENT DECISIONS OF THIS COURT AND THOSE OF OTHER COURTS OF APPEALS.

The National Labor Relations Act confers exclusive bargaining agent status on the labor organization selected by a majority of

employees. *See* 29 U.S.C. § 159(a) ("Representatives designated or selected . . . by the majority of employees . . . shall be the exclusive representative of *all* the employees . . ."). Under the procedures in the NLRA, the Board then certifies that representative as the employees' exclusive representative. *See* 29 U.S.C. § 159(c). The designation of a labor organization as exclusive bargaining representative means that minority employees may not bypass that labor organization and deal directly with their employer. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975). This result is doubly significant when the labor organization is, as here, hostile to minority employees, as they are deprived of both representation and the ability to engage in direct dealing.

The United States Court of Appeals for the Eighth Circuit recognized that Board certification constitutes impermissible governmental complicity in racial discrimination when the local certified engages or has engaged in invidious racial discrimination. *NLRB v. Mansion House Center Mgmt. Corp.*, 473 F.2d 471 (8th Cir. 1973). In *Mansion House*, the Eighth Circuit relied on this Court's decisions in *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to find that constitutional prohibitions precluded Board certification of unions which practice racial discrimination. As the Eighth Circuit explained:

> When a union discriminates on the basis of race or color it invidiously deprives equal opportunity for employment to a large segment of working men. . . . When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. . . . Obviously judicial enforcement of private discrimination cannot be sanctioned.
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> In substance, we hold the remedial machinery of the National Labor Relations Act cannot be available to a union

> which is unwilling to correct past practices of racial discrimination. Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets.

473 F.2d at 473, 477.

The following year the Board adopted the *Mansion House* rationale. *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974). The Board found that this Court's opinions in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), and *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952), as well as the due process clause of the Fifth Amendment, "constitutionally required" it to engage in a precertification inquiry into a union's alleged racial discrimination.[3] The Board reasoned that:

> Were we, as an arm of the Federal Government, to confer the benefits of a certification upon a labor organization which is shown to be engaging in a pattern and practice of invidious discrimination, the power of the Federal Government would surely appear to be sanctioning, and indeed furthering, the continued practice of such discrimination, thereby running afoul of the due process clause of the fifth amendment.

211 N.L.R.B. at 138-39.

The United States Court of Appeals for the Fifth Circuit adopted a variant of the *Mansion House* rule. In *NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436 (5th Cir. 1975), *cert. denied*, 424

[3]The Company notes that none of the decisions of this Court cited by the Board have been overruled or modified; the Company further notes that the due process clause of the Fifth Amendment has also not been overruled or modified.

U.S. 914 (1976), the Fifth Circuit cited both *Mansion House* and *Bekins* for the proposition that invidious union racial discrimination could prevent a union's certification as bargaining representative. The court found, however, that the employer had not proffered sufficient proof that the particular local there involved had engaged in racially discriminatory membership and representation policies. *See* 516 F2d at 447.

The following year, in *NLRB v. Sumter Plywood Corp.* 535 F.2d 917 (5th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977), the Fifth Circuit cited *Mansion House, Bekins* and *Bancroft Mfg. Co.* in support of the proposition that certification of a union would properly be denied:

> when the employer proffer[s] specific evidence sufficient to demonstrate a pattern of racially discriminatory behavior by the union which would support a finding of a definite propensity for racially unfair representation[.]

Id. at 931. However, as in *Bancroft Mfg. Co.,* the court in *Sumter Plywood* found that the employer's evidence failed to establish "the pattern of discrimination necessary" to forestall Board certification. *Id.*

It bears emphasizing that the Company proferred specific evidence in the proceedings below that Local 134's racially discriminatory practices may have excluded as many as 1,000 minority workers from membership in the Local, and that several charges raising the possibility of racial or gender discrimination have been filed with the Board against Local 134 in recent years.[4]

Before the Fifth Circuit could again address this issue, the Board issued its decision in *Handy Andy, Inc.,* 228 N.L.R.B. 447

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[4]See Seventh Circuit Joint Appendix at pp. 26-38 (charges against Local 134 and supporting affidavits) and p. 90 (Report accompanying continuation of Local 134 under federal trusteeship "to correct corruption or financial malpractice" and "to assure the performance of collective bargaining agreements or other duties of a bargaining representative").

(1977), which explicitly overruled *Bekins*. In *Handy Andy*, the Board held that because neither the Constitution nor the Federal labor statutes expressly required it to deny certification to a union that practiced racial discrimination, allegations that unions engaged in such discrimination would thenceforth no longer be a proper basis for an employer's refusal to bargain.[5]

The Fifth Circuit, however, has continued to invoke the *Bekins* rule, both in inflammatory racial appeal cases, *see NLRB v. Heavy Lift Service*, 607 F.2d 1121 (5th Cir. 1979), *cert. denied*, 449 U.S. 822 (1980), as well as in cases in which no campaign took place, and thus in which inflammatory racial appeals are not alleged. *See e.g., Skyline Corp. v. NLRB*, 613 F.2d 1328 (5th Cir. 1980), wherein the Fifth Circuit observed that, notwithstanding *Handy Andy*, "an employer's door to avoidance of union certification through proper proof of union discrimination is not completely closed". 613 F.2d at 1335-36 n.4.[6]

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[5]The Board made clear, however, that it would still consider allegations of invidious racial discrimination: (1) whenever the union engaged in inflammatory racial *appeals* during the campaign, *cf. Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962); (2) whenever a collective bargaining agreement has explicitly racially discriminatory provisions, *cf. Independent Metal Workers Union, Local No. 1 (Hughes Tool Co.)*, 147 N.L.R.B. 1573 (1964) (rescinding, on the authority of *Shelley v. Kraemer* and *Bolling v. Sharpe*, *supra*, the certification of two locals because their negotiated agreements perpetuated racial discrimination); and (3) whenever employee charges of racial discrimination implicates the union's "duty of fair representation" post-certification. None of these exceptions is applicable to or implicated in this case. However, the Company notes that the Board's decision to deny certification in the second situation is inconsistent with its conclusion that it is not required to deny certification when the union practices racially discriminatory membership and representation practices as alleged in this matter.

[6]It will be recalled that the Company filed its petition for review of the Board's order in this case in the Fifth Circuit, where it would have had the benefit of the *Bancroft Mfg. Co.*, *Sumter Plywood*, and *Klingler* line of cases with respect to both Questions that this Petition presents. *See Part II, infra.*

The Ninth Circuit apparently follows the reasoning of *Mansion House* and *Sumter Plywood.* This conclusion is based upon the Ninth Circuit's explanation of the effect of *Handy Andy* which appears in *Natter Mfg. Corp. v. NLRB,* 580 F.2d 948, 951-52 n. 2 (9th Cir. 1978), *cert. denied,* 439 U.S. 1128 (1979). There, the Ninth Circuit stated that *Handy Andy* "required the employer" to timely raise the issue of racial discrimination, if at all, during the "subsequent unfair labor practice proceedings."

The U.S. Court of Appeals for the District of Columbia Circuit appears to have adopted a different variation of the *Handy Andy* rule. *Bell & Howell Co. v. NLRB,* 598 F.2d 136 (D.C. Cir. 1979), *cert. denied,* 442 U.S. 942 (1979). In *Bell & Howell,* the court noted that the "Board had left open the possibility that in the appropriate case it can and will consider evidence of racial discrimination." *Id.* at 150 and n. 46. This observation was based upon the portion of the Board's decision in *Handy Andy* wherein the Board stated that an appropriate remedy for unlawful union discrimination might be revocation of the union's certification. *See* 228 N.L.R.B. at 448.

In direct contrast to the Eighth Circuit's position, and in apparent conflict with that of the Fifth, Ninth, and D.C. Circuits, the Seventh Circuit in the instant case has squarely rejected the legal principle that a defense to a refusal to bargain charge is that the union practices racial discrimination.[7] The Seventh Circuit's blanket holding that claims of racial discrimination "cannot constitute a defense to an 8(a)(5) proceeding" places its decision in direct conflict with every Circuit to decide this issue.

Moreover, the Seventh Circuit's reasons for adopting its extension of the *Handy Andy* rule appear to rest on dubious foundations. The court states that although

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[7]The court does recognize, however, that in *Sewell*-like situations in which the union's campaign or the election itself involves inflammatory appeals to racial prejudice, the employer can object to the "appeal". *See* 943 F.2d at 798 (A11-A12).

> several courts have expressed an inclination to follow cases approximating the *Bekins* approach, no court has explicitly rejected *Handy Andy*. In fact, the cases cited by the Company are easily reconciled with *Handy Andy*, since the pre-*Handy Andy* cases approvingly cited involved allegations that racial prejudice somehow tainted the election itself. *See, e.g., NLRB v. Sumter Plywood Corporation,* 535 F.2d 917, 931 (5th Cir. 1976) (allegations of racially oriented election campaign), *cert. denied*, 429 U.S. 1092 (1977).

943 F.2d at 798-99 n. 9 (A12).

The court's assertion that no courts have explicitly rejected *Handy Andy* is misleading. Although literally true, two Circuits have, both before and after *Handy Andy,* adopted an approach more approximating the *Bekins* rule than the *Handy Andy* rule. They are the Eighth Circuit in *Mansion House, supra* (pre-*Handy Andy*) and the Fifth Circuit in *Skyline Corp, supra* (post-*Handy Andy*). Given that *Handy Andy* purports explicitly to overrule *Bekins, see* 228 N.L.R.B. at 456, it necessarily follows that those Circuits adopting or endorsing the *Bekins* approach implicitly reject *Handy Andy* to the extent that *Handy Andy* does not allow a union's racial discrimination to justify an employer's refusal to bargain.

The Seventh Circuit's reconciliation of cases is also misleading. It is true that the Fifth Circuit's decisions in *Bancroft Mfg. Corp.* and *Sumter Plywood* involved claims of inflammatory racial appeals during the campaign. However, in both cases, the Fifth Circuit approvingly cited and adopted the broad *Bekins* proposition that racially discriminatory membership and representation practices would preclude certification. Furthermore, the Seventh Circuit has completely overlooked the Eighth Circuit's decision in *Mansion House,* the doctrinal ancestor of *Bekins,* which did *not* involve an election at all, let alone inflammatory racial appeals. *See NLRB v. Mansion House Center Mgmt. Corp.*, 466 F.2d 1283 (8th Cir. 1972) (*Mansion House I*). It also overlooks the Fifth

Circuit's decision in *Skyline Corp.*, a post-*Handy Andy* opinion that, like *Mansion House,* did *not* involve an election.

Finally, it is clear that the Seventh Circuit's adoption of the *Handy Andy* rule rests on a startling misunderstanding of common sense and basic employment law principles. Quoting directly from *Handy Andy*, the court opines in support of its holding in this case that "a union that has discriminated in the past and still has a racial imbalance may be preferable for minority workers to no union at all" because without a union the minorities "will be at the mercy of their employer who has no duty of fair representation to fulfill . . . and who may also discriminate against minorities." *See* 943 F.2d at 798 n.8 (A12) (quoting *Handy Andy*, 228 N.L.R.B. at 452-53).

It is disturbing enough that the court apparently believes that minorities need bigoted unions to protect them from bigoted employers.[8] But the court can only truly believe that unrepresented minorities will be "at the mercy of" bigoted employers if it first fails to see that Title VII, the Civil Rights Acts of 1866, and the aggressive remedial machinery of the Civil Rights Act of 1991 at least *formally* impose the same nondiscriminatory constraints on employers as the NLRA's "duty of fair representation" imposes on unions.

In any event, however, the *Handy Andy* rule is itself defective. The potential of duty of fair representation proceedings does not

[8]Minorities themselves may be no less troubled, as well as baffled, by the court's suggestion, in the absence of any cited empirical research, that minorities might "prefer" a discriminatory union to no union at all. As Member Jenkins points out in his eloquent and well-reasoned dissent in *Handy Andy*, such paternalism, however well-intentioned, may well perpetuate rather than alleviate discrimination because it ultimately rationalizes rather than challenges it. *See* 228 N.L.R.B. at 458-59 (noting that had the Board's "preference" logic been applied in the school desegregation cases, blacks would be left to inferior segregated schools on the theory that such schools are "preferable" to hostile integrated ones).

force such unions to mend their discriminatory ways. First, this potential is ethereal. The General Counsel appears not to take DFR claims of racial discrimination seriously. *See* General Counsel Memorandum 79-63, which identifies DFR claims as claims which the General Counsel should attempt to resolve informally by calling the offending union or its counsel. This position clearly undermines the efficacy of the *Handy Andy* rule. And in this case, despite Local 134's continued discriminatory practices, the General Counsel has yet to issue a breach of duty of fair representation complaint against Local 134 despite the filing with the General Counsel of seventeen charges of discriminatory treatment against the Local. Indeed, in the fifteen years since *Handy Andy*, the Board has yet to revoke a union's certification despite acknowledged racial discrimination by unions. *See, e.g., Daniels*, 945 F.2d 906, *supra; EEOC v. Local 638 Sheet Metal Wkrs*, 753 F.2d 1172, 1176 (2d Cir. 1985), *aff'd*, 478 U.S. 421, 427-40 (1986), (detailing the Local's "egregious" persistence in discriminating against minorities in the face of 21 years of agency and court decrees and contempt citations).

Second, requiring minorities to come forward publicly with allegations of union discrimination and submit to the notoriety of DFR proceedings is inconsistent with the Board's rationale for excluding witness statements from Board records under 29 CFR § 102.69(g)(1)(ii) (discussed *infra*). One argument in support of such exclusions is the Board's desire to protect employees from retaliation following disclosure. *See Summa Corp.*, 265 N.L.R.B. 343 (1982), *enf'd without opinion*, 734 F.2d 21 (9th Cir. 1984). Yet, in cases by individuals alleging breach of the duty of fair representation, the General Counsel has directed his field organization to contact the union to see if the matter cannot be resolved before a charge is filed. (G.C. Memorandum 79-63.).

Third, it is irrational for the Board to certify a union which has discriminated against 10,000 with the promise that it will revoke that union's certification upon proof that it has discriminated

against 10 more. This rule provides little solace to either the 10,000 or the 10 who have been victimized, and even less deterrence to the union since, under the Board's *Handy Andy* rule, this additional discrimination will not preclude its certification in yet another bargaining unit.

The better rule would combine the approaches of the Eighth and Fifth Circuits: the use of statistics and *prima facie* standards to identify those unions which have exhibited a "propensity" for racial discrimination in the past and/or which are likely to engage in such discrimination, and the withholding of certification from such unions until they provide satisfactory assurances that they will refrain from such discrimination in the future. Although such a rule may not in reality rid the collective bargaining process of racial discrimination, it will both withhold the benefits of certification from at least the most egregiously racist unions, at the same time that it precludes the federal government's involvement in and perpetuation of racial discrimination by such unions. A writ of *certiorari* is appropriate in this case in order to allow the Court to articulate whether—and, if so, to what extent and how—the due process clause of the Constitution precludes federal complicity in racial discrimination by labor organizations.

II. THE SEVENTH CIRCUIT'S ENFORCEMENT OF THE BOARD'S ORDER ON THE BASIS OF EVIDENCE NOT OF RECORD DUE TO AN INVALID BOARD RULE CONFLICTS WITH PERTINENT DECISIONS OF THIS COURT AND THOSE OF OTHER COURTS OF APPEALS.

Judicial review of agency decisions is governed by Section 706 of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706. Section 706 requires that the reviewing court conduct its review based upon "the *whole* record or *those parts* of it cited by a party, and due account shall be taken of the rule of prejudicial error" (emphasis supplied).

In this case, however, the Seventh Circuit did neither. That is, it did not review the whole record, nor did it review those parts cited by the Board. This occurred because the Board failed to submit the complete record to the court because it (the Board) had issued a rule which purportedly excused it from so doing. The Seventh Circuit's decision to give effect to the Board's practice of precluding judicial review of its decisions conflicts with the decisions of the Fourth, Fifth, Sixth and Ninth Circuits, and with the decisions of this Court.

When objections are filed to conduct affecting the results of an election, the Regional Director conducts an administrative investigation to determine if there is a *prima facie* case of objectionable conduct. *See* 29 CFR § 102.69(d). The Regional Director may do no more than receive affidavits from the objecting party. The Regional Director may interview witnesses tendered by the objecting party. Or, the Regional Director may both receive affidavits and interview witnesses.

Regardless of which strategy the Director pursues, this Court has made it perfectly clear that an administrative agency cannot, by rule or otherwise, decide what portions or how much of the record relied upon by the agency will be submitted to the reviewing court. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971) ("whole [agency] record" for purposes of judicial review under § 706 of APA not found where record contained only conclusory, "post-hoc" affidavits specifically prepared for litigation). (In this case there is not even a post-hoc affidavit.) *See also Smith v. FTC*, 403 F. Supp 1000, 1008 (D. Del. 1975).

Until the Seventh Circuit's decision in this case, the Circuit courts had taken several different but consistent approaches to the Board's failure to submit the "whole" record for judicial review. The approaches taken by the courts depended upon the nature of the Regional Director's investigation. The Seventh Circuit's decision to rely on materials not of record is in direct conflict with the other Circuits which have considered this issue, and

represents an abdication of the court's duties under Section 706 of the APA. This conflict therefore presents the Court with a unique opportunity to resolve the entire spectrum of issues raised by the Board's practice of attempting to avoid judicial review of its decisions. Accordingly, this Petition should be granted, the decision of the Seventh Circuit reversed, and the Board directed to submit for judicial review the affidavits obtained during the Acting Director's *ex parte* investigation.

The Ninth Circuit has flatly rejected the argument that the Board may adopt a rule which precludes judicial review. *NLRB v. Advanced Systems*, 681 F.2d 570 (9th Cir. 1982). As the Ninth Circuit explained, "to interpret the rule [Section 102.69(g)] to allow the Regional Director to exclude from the record evidence that he relied on would frustrate meaningful review . . . by the courts of appeal." *Id.* at 571. *See also, NLRB v. West Coast Liquidators, Inc.*, 725 F.2d 532, 534 (9th Cir. 1985) (meaningful review by the court would be frustrated if the record did not include all evidence relied upon by the Regional Director).

The Fifth Circuit agrees with the Ninth Circuit. *NLRB v. Klingler Electric Corp.*, 656 F.2d 76 (5th Cir. 1981). There, the court observed that Section 102.69(g) did not relieve the court "of its responsibility to consider *all* the evidence that underlies any agency decision." (emphasis supplied) *Id.* at 82 n.6.

Likewise, the Sixth Circuit has refused to enforce a Board decision when the materials supporting the decision were not of record. *Kitchen Fresh, Inc. v. NLRB,* 716 F.2d 351 (6th Cir. 1983). As the Sixth Circuit explained, "when the Board fails to . . . transmit the complete administrative record, we cannot ascertain whether the allegations are supported by the evidence gathered in the administrative investigation . . ." *Id.* at 358. The Seventh Circuit's decision to proceed in the instant manner is also in direct conflict with the Sixth Circuit's decision in *NLRB*

v. Shraders, 928 F.2d 194 (6th Cir. 1991). There, the Sixth Circuit refused to enforce a Board order on the basis of materials which were not of record because "we cannot determine if the director fairly and accurately characterized the stories of the union's witnesses or whether the [union's] version [of the] events should be credited over those of the company's witnesses." *Id.* at 198.

Thus, the courts have essentially taken three approaches when faced with an incomplete record. They have either flatly refused enforcement and remanded the case to the Board, *see NLRB v. Cambridge Wire Cloth Co. Inc.,* 622 F.2d 1195 (4th Cir. 1980)[9]; or have construed the Company's well-pleaded factual assertions most favorably to the Company to determine whether they establish a *prima facie* case of objectionable conduct, *see Advanced Systems, Inc., supra;* or have ordered the production of the affidavits and allowed the employer to file a supplemental brief. *See Klingler Electric, supra,* 656 F.2d at 85, n. 11. Here, the Seventh Circuit did neither. Rather, it relied on material not of record, and which it had never reviewed, to enforce the Board's order.

The extreme prejudice which resulted in this case as a result of the Seventh Circuit's error is apparent from even a casual perusal of the record and the Acting Director's decision. The record in this case clearly established a *prima facie* case sufficient to require a hearing. The Company objected to the election because Local 134 had issued theretofore unavailable "B" apprenticeship cards to three employees during the critical period before

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[9]*Cambridge Wire Cloth* was decided under the predecessor to §102.69(g)(l)(ii). Subsequently, in *National Posters v. NLRB,* 720 F.2d 1358 (4th Cir. 1983), which involved the current Board rule, the court ruled that an employer could not remonstrate the absence from the record of affidavits *it* had submitted to the Regional Director but had not *itself* appended to the record. *See id.* at 1361-62. Accordingly, *National Posters* does not reach the nettlesome issue raised by this case: What is the proper judicial response under §706 of the APA to a record that excludes the material collected and relied upon by the Regional Director?

the election. The record evidence relating to this objection establishes the following:

> a) That a supervisor asked Local 134 business agent Joseph Duffy to issue "B" apprenticeship cards to the three unit employees who had enrolled in the Company's apprentice training program;
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> b) That in response to this request, Duffy told him that "B" apprentice cards were not available in the Chicago area but that the three employees would be issued permits;
>
> c) That Local 134 business agent, Duffy, stated that the three employees would maintain their "B" permits during their four year tenure in the Company's apprenticeship program and upon completion thereof be issued "B" *journeyman* cards.
>
> d) That these three individuals were the first and only employees ever to be enrolled in the Company's apprenticeship program.[10]

The Company has not appealed from the Acting Director's findings, though based on material not of record, 1) that the three apprentices retained permit credentials from 1986 until August, 1988; 2) that prompted by a question from one of the three individuals following a union organizing campaign meeting, one of Local 134's agents offered "B" apprenticeship cards to the three employees "no questions asked"; and 3) that Local 134's executive board thereafter issued the three employees the theretofore non-existent "B" apprenticeship cards.[11] This evidence establishes a *prima facie* case of objectionable conduct warranting that the Board at least conduct a hearing on these allegations, if not invalidate the election. *See Mailing Services*, 293 N.L.R.B. No. 58 (1989); *Wagner Electric Corp.*, 167 N.L.R.B. 532, 533 (1967); *cf NLRB v. Madisonville Concrete*, 552 F.2d 168 (6th Cir. 1977).

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[10]See Seventh Circuit Joint Appendix at pp. 13-25.

[11]This procedure was the same procedure outlined by Duffy as part of Local 134's campaign to avoid its obligations under the consent decree in the *Ridgeway* discrimination suit—the "Beat Bua program."

A hearing was not held in this case, however, because the Acting Director conducted an *ex parte* interview which is not of record. The Acting Director's Report recounts the results of his *ex parte* interview of "the Union business agent" (presumably Duffy). That business agent's affidavit, however, is not of record. Accordingly, the evidence in this unreviewed affidavit is not of record and cannot be relied upon by the court. Absent this affidavit, there is no evidence to support the Regional Director's ethereal "past practice" finding. (It is ethereal in that there *had never been* any such prior practices.) No clearer prejudicial error could be imagined.

The Seventh Circuit's treatment of the evidence relating to the Company's other two objections is also erroneous. As to the threat to blackball employees, an employee witness produced by the Company told the Acting Director that a union steward told four employees that they would be blackballed by Local 134 if Local 134 lost the election. This evidence establishes a *prima facie* case sufficient to set aside the election. *See United Broadcasting Co. of New York*, 248 N.L.R.B. 403 (1980).[12]

Based upon his *ex parte* investigation, the Acting Director concluded that even though other employees subsequently discussed being blackballed, the threat was not objectionable. The Acting Director reasoned that because the employees had not directly attributed this threat to the union steward, the threat had not been disseminated. Therefore, in the Acting Director's judgment, no hearing was warranted. The affidavits or witness statements supporting this "no attribution" finding are not of record, and therefore can not serve to vitiate the Company's *prima facie* case. *See West Coast Liquidators*, 725 F.2d 532, *supra.*

Again, the Company has been severely prejudiced by the court's failure to require the disclosure of the record or, alternatively, by the court's enforcement the Board's order.

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[12]While the employee's affidavit is not of record, the Company did not contest the Acting Director's findings as to its contents.

The Company's third objection involved Local 134's threat that employees would lose their union pensions if Local 134 lost the election. A supervisor's affidavit which *is* of record establishes that an employee told him he would lose his pension if Local 134 did not win the election. The Company tendered a copy of Local 134's by-laws and a copy of its parent organization's constitution, both of which are of record, which establish that union members who work for non-union employers lose their union pensions.

The Acting Director conducted an *ex parte* investigation and overruled this objection. The Acting Director concluded that, because the employee related that no union agent had told him he would lose his pension, there was no threat. This affidavit is not of record. Thus, there is no evidence as to whether the Acting Director asked this employee if he had learned about the loss of his pension by reading the union's governing documents. Clearly, the Seventh Circuit's decision in this circumstance alone to enforce the Board's order based upon material not of record directly conflicts with the Sixth Circuit's decision in *NLRB v. Shraders*, *supra*. *See* 928 F.2d at 197-98.

The Seventh Circuit denied the Company's motion to supplement the record as done in *Klingler, supra,* 636 F.2d at 85 n.11. The Seventh Circuit found that the Company's arguments based upon the incompleteness of the record were waived because these arguments had not been raised before the Board. This finding is wide of the mark. Whether the record which is before the court satisfied the requirements of Section 706 can only be argued before the court. Section 706 establishes the standards for *judicial* review; it does not establish standards for the Board's review of its Regional Directors' decisions. The issue was and is the contents of the record *the court* will review to fulfill its statutory obligations under Section 706. What the Board does or does not do internally is of no moment, as Section 706 does not apply to Board procedures. *Cf. Klingler, supra.* The answer to the inquiry

in this case, of course, is simple: the contents of the record that the court reviews must consist of the entire record before the agency, or at the very least the parts of the record cited or relied upon by it. To hold otherwise is to make a "mockery of judicial review." *Smith v. FTC*, *supra*, 403 F.Supp at 1008.

In other words, it is for the courts, and not for the Board, to decide the meaning of the term "whole record" in Section 706 of the APA. *Cf. Overton Park*, *supra*, 401 U.S. at 402. The Board simply may not implement a rule which effectively defines the "record" so as to preclude the judicial review mandated by a federal statute. It does not have the authority to do so.

Second, even were the Company "obligated" to raise the incompleteness of the record for Section 706 purposes before the Board, the Company's failure to do so should be excused because it would have been futile to do so. The Board has repeatedly, clearly, and emphatically refused to require the inclusion of exactly the type of information that the Company sought to make part of the record in this case. As the Sixth Circuit has squarely held in such circumstances, Section 10(e) of the Act does not require that such futility be undertaken, as it constitutes an "extraordinary circumstance" under this Section. *See Kitchen Fresh, Inc. v. NLRB*, 716 F.2d 351 (6th Cir. 1983).

Third, under the Administrative Procedures Act, the Board cannot alter in an adjudicatory proceeding a rule promulgated pursuant to its rule making, non-adjudicatory authority. *See* 5 U.S.C. § 553. Section 553 of the APA sets forth the procedures that federal agencies like the Board are required to use whenever they change their rules. *See* 5 U.S.C. § 553(b)-(e).

Section 553(b)(A), however, expressly exempts from these requirements "interpretive rules, general statements of policy, [and] rules of agency organization, procedure or practice." *Id.* Overwhelmingly, the courts have interpreted this exception narrowly:

even when the rule change ostensibly concerns only mechanical rules, the courts have held that the changes fall outside of the (b)(A) exemption—and thus must run the gauntlet of § 553's formal rulemaking procedures—whenever the changes grant new rights to, or impose new obligations on, persons affected by them. *See, e.g., McDonnell Douglas Corp. v. Marshall,* 465 F. Supp. 22 (E.D. Mo. 1978), *aff'd*, 609 F.2d 898 (8th Cir. 1978). *See also, Cities of Anaheim, Riverside, et al. v. FERC*, 723 F.2d 656, 659 (9th Cir. 1984) (noting, on the authority of *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 659 (1969), that although administrative agencies are free to announce new principles during adjudication, they may not do so in order to circumvent the rulemaking procedures of § 553 of the APA where these procedures are required).

Although there are no cases on point, it is apparent that a Board decision to mandate inclusion of witness statements in the record (*i.e.*, a change in Section 102.69(g)(1)) would grant litigants before the Board substantial and important new rights and thus would have required the Board to follow the formal rulemaking procedures of § 553 of the APA. Indeed, the Board's conduct when it last changed Section 102.69(g) corroborates this point. On that occasion, the Board followed the formal rulemaking procedures of § 553 in amending the former § 102.69(g) to its current version in 1981. Accordingly, because the Board would not have been able to give the Company the relief it sought, the Seventh Circuit's decision finding a waiver is simply wrong.

Additionally, the Seventh Circuit's waiver finding is wrong because the Board's Rules are grossly misleading. Section 102.69(g)(3) of the Board's Rules and Regulations (which purportedly authorizes the agency to define the record that the court will review) provides that the employer's only obligation is to attach to its request for review the materials "*it* has timely sub-

mitted to the Region." *See* 29 CFR § 102.69(g)(3). There is no requirement that the employer attach the affidavits, if any, garnered by the Regional Director during his *ex parte* interviews of unknown and undisclosed individuals.[13]

As the cases discussing this issue indicate, the language of Section 102.69(g) does not put anyone on clear or sufficient notice that *they* are responsible for submitting affidavits that *they* do not have, from witnesses they do not know, and which they did not submit to the Regional Director. It is illogical, not to mention disingenuous, for the Board and the courts to read the words of §102.69(g)(3) which are inclusionary (which "*it* has submitted". . .) as also being exclusionary ("as well as those it did not submit" (implied)).

None of the reasons that the Board advances in support of its rule are sound in the circumstances of cases like the present one. First, the Board asserts that §102.69(g)(1)(ii) is necessary to prevent an objecting party from forcing the Board to go on a "fishing expedition" in search of unidentified evidence. *See, e.g., Summa Corp., supra.* This argument is both misdirected and specious. The parties are before the courts, not the Board. With access to a complete record, the employer can identify the evidence establishing a *prima facie case. Cf. Klingler, supra*, 656 F.2d at n.11. Moreover, this argument simply fails to apply to those cases, as here, where the Company has clearly specified the information it wishes the Board to make part of the record: *i.e.,* all statements by witnesses collected in the course of the Acting Director's interviews. (There are twenty-four such statements in this case.) Because the Company does not know what the contents of these statements are, greater specificity on the Company's part is not

[13]It is Section 102.69(g)(1) that purportedly authorizes the Regional Director, a subordinate agency official, to decide which materials (affidavits and documents) would be part of the record by the simple expedient of attaching them or not attaching them to the Report on Objections.

possible; because such a request clearly describes what documents are sought, greater specificity should not be required.

Next, the Board argues that omitting witness statements is necessary to protect the anonymity of witnesses who may testify to avoid possible intimidation. *See Summa Corp., id.* The courts of appeals are split on the validity of this reason. The Fourth, Fifth and Ninth Circuits permit disclosure. *See Cambridge Wire, supra; Klingler; supra; West Coast Liquidators, supra.* The Seventh Circuit, however, honored this concern in this case.

It must be mentioned, first, that this argument is wholly inconsistent with the Board's position in *Handy Andy* that a breach of the duty of fair representation action serves as an effective check on a rogue union. As the Board is well aware, a cause of action alleging breach of the duty of fair representation claim can be advanced *only if* the aggrieved individual comes forward and *publicly* charges the union with discrimination. The possibility of intimidation is every bit as great in these circumstances as in an election objection case.

Next, this argument overlooks the fact that it is unnecessary to protect witnesses who are not employees of the Company (i.e., Local 134's business agent).

Finally, the argument is superfluous. As the Ninth Circuit reasoned in *West Coast Liquidators, supra*, much of the factual information in the affidavits can be disclosed, while simultaneously protecting the affiant, by deleting any identifying information from the documents produced. *See* 725 F.2d at 535. Alternatively, the unexpurgated affidavits can be inspected *in camera. Id.*

CONCLUSION

For the reasons stated, this Court should grant the Company's Petition for Certiorari, summarily vacate the Seventh Circuit's decision, and remand to a hearing officer of the Board to conduct a hearing on the Company's objections to the election. Alternatively, this matter should be remanded to the Board to conduct a hearing on Local 134's invidious racial discrimination practices.

A third alternative would be for the Court to grant the Petition and itself give the case plenary consideration.

Respectfully submitted,

Douglas A. Darch*
Clarence T. Pollard
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Attorneys for Petitioner
March 5, 1992

*Counsel of Record

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

943 F.2d 791

Nos. 90-3182 and 90-3499

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, AFL-CIO,

Intervening Petitioner,

v.

CHICAGO TRIBUNE COMPANY,

Respondent-Cross-Petitioner.

On Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.
No. 13-CA-29019

ARGUED MAY 16, 1991—DECIDED SEPTEMBER 24, 1991

Before CUMMINGS, CUDAHY, and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The International Brotherhood of Electrical Workers, AFL-CIO (the Union), won a representation election among a group of employees of the Chicago Tribune Company (the Company). The Company filed objections to the election. The National Labor Relations Board (the Board) overruled the objections and certified the Union as the bargaining representative of the unit employees. The Union demanded that the Company commence bargaining. When the Company refused to bargain with the Union, the Board determined this refusal to be unlawful and ordered

the Company to bargain with the Union. The Board filed an application for enforcement; the Company filed a cross-petition for review. For the following reasons, we deny the petition for review and enforce the order.

I

BACKGROUND

The Company and the Union had a relationship, dating back about 40 years, that allowed the Company to obtain many of its electricians through referrals from the union hall. The Union, however, did not have a collective bargaining agreement with the Company. On July 8, 1988, the Union filed a representation petition with the Board seeking to represent the Company's electricians. In a secret-ballot election held on October 4, 1988, the employees selected union representation by a vote of 25-14.

The Company filed several objections to the election. First, the Company contended that the Union threatened employees with forfeiture of their pensions if employees failed to support the Union in the election. The Union's pension required an employee to have at least 20 years of consecutive service and to maintain his membership in good standing until retirement. Under the Union rules, individuals could lose their "membership in good standing" (and thus their pension) by working at a non-union employer, which the Company would become if employees voted against Union representation. Respondent's Br. at 7. A supervisor testified to the regional director that an employee told him that, if the Company won the election, he might lose his pension benefits; the employee did not say, however, that anyone connected with the Union had so stated. On the basis of this submission, the Company argued that employees were told that they would lose their pensions if they did not vote for the Union.

The Company's second objection to the election was that the Union's steward told a group of three or four employees in August of 1988 that, if the Union lost the election, the Union would "blackball" the employees. Another employee

reported that on September 5, 1988, he heard that, if the union lost the election, the employees would be blackballed from working in other union shops in the Chicago area.

The Company also alleged that the Union had promised to grant benefits to employees if they voted in favor of the Union. The Company asserted that employees were promised upgraded credentials and that three workers actually received upgraded credentials in the critical period before the election. Moreover, the Company claimed that the Union made promises to employees that, if the Union won the election, they would receive a Union pension considerably more generous than the then-current pension.

Finally, the Company contended that it should not be required to bargain with the Union because the Union had demonstrated a propensity for invidious racial discrimination. This argument was based on what the Company described as the Union's "long and ignominious history of corruption and discrimination," including admission practices that discriminate against blacks and Hispanics. Respondent's Br. at 10.

The Board's regional director conducted an administrative investigation. Both the Company and the Union were permitted to submit evidence regarding each of the foregoing objections to the election. After reviewing the evidence, the regional director recommended to the Board that each of the Company's objections be overruled. On June 9, 1989, the Board adopted the regional director's findings and recommendations, denied the Company's request for an evidentiary hearing, and certified the Union as the collective bargaining agent of the unit employees. The Company's request for reconsideration was denied on September 8, 1989.

The Company refused to bargain and the Union filed an unfair labor practices charge. Based on that charge, the Acting General Counsel issued a complaint alleging that the Company's refusal to bargain violated sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* On December 11, the General Counsel filed a motion for summary judgment.

On July 11, 1990, the Board determined that all issues raised by the Company were or could have been litigated in the underlying representation proceeding and that the Company had not offered any newly discovered and previously unavailable evidence, nor alleged any special circumstances that would require the Board to reexamine its decision in the representation proceeding. The Board thus granted the motion for summary judgment and issued an order requiring the Company to cease and desist from refusing to bargain with the Union. The Company now seeks review of the Board's order.

II

ANALYSIS

A. *Guiding Principles*

In several recent decisions, this court has set forth the principles that must guide our decision here. At the outset, we must remind ourselves that our review of the Board's decision to certify a collective bargaining agent following an election is extremely limited. *Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 784 (7th Cir. 1988). "We must defer to the Board's reasonable selection of rules and policies to govern the election, and we will uphold the application of those rules if substantial evidence supported the Board's decision." *Id.; see also NLRB v. Browning-Ferris Indust., Inc.*, 803 F.2d 345, 347 (7th Cir. 1986). The burden on the party challenging an election is a formidable one. As Judge Wood wrote in *Van Leer*, the party challenging the election has the burden of showing that substantial evidence does not support the Board's decision. *Van Leer*, 841 F.2d at 784. To meet this burden, the objecting party must show that the unlawful acts occurred and "that those acts interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB v. Service Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988).[1] When presented with such allegations, the regional director

[1] *See also Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 787 (7th Cir. 1988) (Board must determine whether Union statements reasonably can be construed as tending to intimidate or coerce employees to vote in the Union's favor).

is required to hold an evidentiary hearing if there are "substantial and material factual issues." 29 C.F.R. § 102.69(d); *see generally NLRB v. ARA Serv., Inc.*, 717 F.2d 57, 63-64 (7th Cir. 1983). "[T]he regional director must hold a hearing when the employer presents facts 'sufficient to support a prima facie showing of objectionable conduct,' that is, of 'misconduct sufficient to set aside the election under the substantive law of representation elections.' " *NLRB v. Lovejoy Indus., Inc.*, 904 F.2d 397, 400 (7th Cir. 1990) (quoting *Service Am. Corp.*, 841 F.2d at 195). The decision of whether to hold an evidentiary hearing requires the Regional Director to draw upon a great deal of expertise about the labor relations environment. As Judge Easterbrook wrote in *Lovejoy Industries,*

> a decision not to hold a hearing when confronted with certain evidence amounts to a decision that this evidence is not a prima facie case of *enough* misconduct to set aside an election. That is the sort of decision the Board was established to make, and to which the courts must defer. Additional hearings mean additional delay. Congress insulated from judicial review the decision to certify a union as bargaining representative precisely because it was concerned about the baleful effects of delay.

904 F.2d at 402.[2] Consequently, in reviewing the decision not to conduct an evidentiary hearing on the Company's objection, we must consider whether substantial evidence supported the Board's determination that the Company did not present a prima facie case for setting aside the election. *See Van Leer*, 841 F.2d at 784; *NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 527 (7th Cir. 1986).

B. *The Company's Allegations*

1. Threat of loss of pension rights

The Company alleged that Union agents threatened em-

[2] *See also NLRB v. Precise Castings, Inc.*, 915 F.2d 1160, 1164 (7th Cir. 1990) ("Rerunning elections, or litigating about their validity, may frustrate indefinitely the implementation of the employees' legitimate selection. Choosing how much imperfection to accept is for the Board."), *cert. denied*, 111 S. Ct. 1581 (1991).

ployees with loss of their pension rights if they failed to support the Union in the election. But the only evidence the Company proffered to the regional director was one supervisor's statement that an employee had told him that, if the Company won the election, the employee might lose his pension rights. The supervisor also stated that the employee had not indicated that anyone connected with the Union had told him that he might lose his pension rights. Moreover, when interviewed by the regional director, the employee stated that *no one* had *ever* told him that if the Union lost the election he would lose his pension rights. *See* Respondent's App. at 8. In short, substantial evidence supports the Board's decision to over-rule this objection. The Company presented no evidence that in any way demonstrates that the alleged threats either were made by the Union or interfered with the results of the election.

The Company also points to provisions in the Union's constitution and bylaws that allegedly require the forfeiture of pension rights if an employee works for a non-union employer (which the Company contends it would be considered if it lost the election). In its brief, the Company occasionally suggests that the mere existence of these provisions is sufficient to invalidate the election. The Company contends that because these provisions were in effect during the critical period before the election and because at least one employee knew about them, the election must be set aside. In other portions of its brief, the Company appears to recognize that the existence of such provisions must be communicated to employees in order to vitiate an election. In any event, the Company has pointed to no case in which the Board has overturned an *election* absent a showing that the threat—be it oral or written—was disseminated to employees.[3] That the Board would require the party challenging the results of an

[3] The Company cites *Hancock Fabrics*, 294 N.L.R.B. No. 4 (1989); *Lynn Edwards Corp.*, 290 N.L.R.B. No. 28 (1988); *Sheet Metal Workers Local 16 (Salem Heating)*, 274 N.L.R.B. 41 (1985), *enf'd*, 873 F.2d 236 (9th Cir. 1989); and *Engineers & Scientists Guild (Lockheed-California)*, 268 N.L.R.B. 311 (1983), for the proposition that the mere maintenance of an illegal provision requires setting aside the election. Yet these cases are inapposite because the Board considered only whether the maintenance of particular

(Footnote continued on following page)

election to demonstrate more than a technical violation is hardly surprising: the Board is not required "to treat employees as if they were bacteria on a petri dish that must be kept free from contamination." *Lovejoy Indus.*, 904 F.2d at 402. Rather, the Board utilizes its expertise to determine how much misconduct is too much misconduct to guarantee that the result of the election truly reflects the choice of the employees. The Board, as we have indicated above, thus evaluates an objection to an election to determine whether the evidences establishes "interference with employee free will such that the election should be overturned." *Van Leer*, 841 F.2d at 785.

Here, however, we believe that the Company has failed to demonstrate that any employee actually knew of the pension provisions. In fact, the Company can point to the testimony of no employee who has stated that he was aware of these provisions. Because the Company has not proffered specific evidence from or about any employee from which it reasonably could be inferred that the provisions tended to coerce employees, we must reject the Company's challenge. *See NLRB v. Service Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988). The Company has not shown that the pension provision "provoke[d] reasonable concern among employees that their jobs would be in jeopardy if they did not vote for Union representation." *Van Leer*, 841 F.2d at 787. "Simply put, the Company has not proffered any evidence to show that any employee was even cognizant of the allegedly illegal provisions, much less intimidated or coerced by their mere existence, and absent a showing of a nexus between those provisions and the election campaign, the Company's assertion must be rejected." Petitioner's Br. at 10-11.

2. Threat to blackball employees

The Company contended that Union agents threatened employees with the loss of employment opportunities if they

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[3] *continued*
provisions constituted an unfair labor practice, not whether the maintenance of the provisions was grounds for overturning an election. The Company also points us to several cases in which threats clearly were disseminated to the employees before the election. *See Benjamin Coal Co.*, 294 N.L.R.B. No. 44 (1989); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962).

failed to support the Union in the election. One employee stated that he heard a Union steward tell a group of employees that, if the Union did not win the election, the Union would blackball the employees from working in any union shops in the area. The employee named two other unit employees who were present and a non-unit employee and another unit employee who he thought might have been present at the time. The employee who indicated that he overheard the steward's statement also stated that he did not tell any other employees that the steward made the alleged threat. Another employee stated that he heard a rumor from other employees that if the Union lost the election, the employees would be blackballed from working in other union shops in the Chicago area. That employee also stated that no one from the Union ever told him that it would blackball employees if it lost the election.

In overruling this objection, the Board assumed that the union steward was an agent of the Union. But the Board found that the statement regarding blackballing did not constitute objectionable conduct because the threat was made approximately two months prior to the election, the threat was never renewed, and the threat was never disseminated among unit employees. *See* Respondent's App. at 27. In short, the Board determined that the Company did not present evidence of enough misconduct to warrant an evidentiary hearing; substantial evidence supports this determination. As the Board noted, there was a considerable period of time between the steward's statement and the election,[4] and the Company failed to show that the threat was ever renewed near the time of the election.[5] Moreover, the alleged threat does not appear to have been disseminated.[6] Substan-

[4] The unit employee who heard the alleged threat testified that it was made sometime in August of 1988. The election was held on October 4, 1988.

[5] *Cf. Westwood Horizons Hotel*, 270 N.L.R.B. 802, 802-03 (1984) (election overturned where threats made two weeks before election and on day of election); *United Broadcasting Co. of New York*, 248 N.L.R.B. 403, 403-04 (1980) (election overturned where threats made two and three days before election).

[6] The Company contends that, because several employees discussed a rumor of possible blackballing, it has shown dissemina-

(Footnote continued on following page)

tial evidence thus supports the Board's decision to overrule this objection.

3. Issuance of apprenticeship cards

The Company had a practice of requesting union credentials when it hired an electrician. The Union would then issue credentials that would allow the individual to work with other union members. The Company charged that the Union made representations to it about the criteria for various credentials but, contrary to those representations, gave undeserved credentials to workers in order to induce them to vote for the Union. The regional director interviewed the workers and the union officials. On the evidence presented, the Board overruled this objection, holding that the evidence could not support the conclusion that the three apprentices were offered their cards in exchange for supporting the Union in the election. "Rather, the evidence shows that the apprentices were issued 'B' apprentice cards by the [Union] based on the past practice between the parties." Respondent's App. at 16.

Substantial evidence supports the Board's determination. The Company has not presented evidence that the Union issued apprentice cards outside the "normal course of business" in order to influence the vote in the election. *St. Francis Fed'n of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 850 (D.C. Cir 1984). In fact, after reviewing the evidence presented to the regional director, it appears that the apprenticeship cards were issued as soon as the Union became aware that the apprentices had been employed for

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[6] *continued*
tion of the Union threat. At the very least, argues the Company, dissemination should be presumed in this case. The regional director reasoned that, "while employees may have discussed being 'blackballed' during the election campaign this discussion was merely employee speculation which was never linked to any threat, overt or implied, by anyone associated with the [Union]. If the Board were to consider mere employee speculation of the possibility of retaliation by the losing party to an election as objectionable conduct, it would be impossible to conduct valid elections." Respondent's App. at 11. In *NLRB v. Lovejoy*, 904 F.2d 397, 402 (7th Cir. 1980), this court determined that employee speculation is insufficient to invalidate an election. Thus, we believe that the Board correctly refused to hold an evidentiary hearing on this basis.

more than one year and that this was the Union's normal practice. Therefore, because there was no change in the status quo with regard to employee benefits, the Union's issuance of the apprenticeship cards did not interfere with the election. *See Gossen Co. v. NLRB*, 719 F.2d 1354, 1356 (7th Cir. 1983).

4. Credibility determinations

With respect to each of these allegations, the Company also contends that the regional director erred by resolving credibility disputes on the basis of his *ex parte* interviews. According to the Company, the regional director impermissibly relied on his interviews to draw inferences and resolve substantial and material factual issues. However, as we have already noted, a hearing is required only when the objecting party raises substantial and material factual issues. "To meet this burden, the objecting party must allege misconduct sufficient to set aside the election under the substantive law of representation elections and proffer 'specific evidence from or about specific people.' " *NLRB v. Service Am. Corp.*, 841 F.2d 191, 195 (7th Cir. 1988) (quoting *NLRB v. Douglas County Election Membership Corp.*, 358 F.2d 125, 130 (5th Cir. 1966)). Here, however, the Company has proffered no specific evidence of conduct sufficient to set aside the election. Indeed, our review of the record indicates that the hearing officer accepted as true the Company's allegations, but considered these allegations insufficient to set aside the election. The Company's contention that employees feared losing their pension rights was accepted as true, but found insufficient to warrant an evidentiary hearing because these employee fears were not attributable to any statement made by the Union; the Company's contention that a union steward threatened employees with "blackballing" was accepted as true, but found insufficient to invalidate the election because these threats were temporally distant from the election and had not been disseminated to other employees; the Company's allegation that the Union issued apprenticeship cards was accepted as true, but found insufficient to overturn the election because these cards were issued pursuant to established practice. In short, the regional director

did not make credibility determinations in recommending to the Board that the Company's objections be overruled. Rather, the regional director merely evaluated the significance of the Company's objections and determined that the alleged misconduct did not raise substantial and material issues of fact. Given our deferential review of the Board's decision not to hold a hearing, we cannot say that the Board's decision is not supported by substantial evidence. *See Lovejoy Indus., Inc.*, 904 F.2d at 400 ("There may be 'substantial' evidence behind the regional director's action even though a court with the power of de novo review would have found the decision wanting.").

C. *Alleged Union Racial Discrimination*

The Company contends the Union should have been denied certification because the Union allegedly discriminates against employees on the basis of race. Therefore, argues the Company, this court should remand for a hearing on the Company's evidence of discrimination. In rejecting this argument, the Board stated that "[i]t is well settled that allegations of racial discrimination are properly cognizable under the duty of fair representation and must be adjudicated under Sec. 8(b) of the Act and cannot constitute a defense to an 8(a)(5) proceeding." Respondent's App. at 30.

In *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), the Board established that employer allegations of union racial discrimination will not be entertained as a defense to a refusal to bargain unless that allegation relates to unfairness in the election itself.[7] "[B]ecause of the essentially non-adversary nature of representation proceedings, we believe that allegations of invidious discrimination should be considered in such proceedings only when required to fulfill our primary obligation of protecting employees from interference in exercising their right to select a bargaining representative." *Id.* at 454. To consider in representation proceedings claims of union discrimination unrelated to the election, reasoned the Board, would provide employers with "an incentive to inject

[7] The Board's decision in *Handy Andy* explicitly overruled its prior holding in *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974).

charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination." *Id.* at 453.[8]

Here, the Company has not provided concrete evidence that the alleged union discrimination was in any way related to the election or the pre-election campaign. The Company alleges that a number of charges of discrimination have been filed against the Union, that the Union has been named in at least one lawsuit for its discriminatory practices, that is has attempted to disobey court orders, and that the Union probably has denied membership to minorities on racial grounds. However, under *Handy Andy*, because these allegations are unrelated to the election process, an evidentiary hearing was not required.[9]

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[8] The Board also reasoned that

> [E]ven a union which practices some unlawful discrimination may be the best one available in the opinion of the workers in the unit, who are given the right to decide for themselves under the Act. Even if minority members of the unit are convinced that the union will fairly represent them, and vote for the union under the Bekins approach, a bargaining order may still have to be denied. Yet, the minority workers might not be helped by keeping the union out, since they then will be at the mercy of their employer who has no duty of fair representation to fulfill, who may act to the detriment of all the workers, and who may also discriminate against minorities. In short, a union that has discriminated in the past and still has a racial imbalance may be preferable for minority workers to no union at all.

Handy Andy, Inc., 228 N.L.R.B. 447, 452-53 (1977).

[9] The Company argues that *Handy Andy* has not been favorably received by the courts. We disagree. Although the Company argues that several courts have expressed an inclination to follow cases approximating the *Bekins* approach, no court has explicitly rejected *Handy Andy*. In fact, the cases cited by the Company are easily reconciled with *Handy Andy*, since the pre-*Handy Andy* cases approvingly cited involved allegations that racial prejudice somehow tainted the election itself. *See, e.g., NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 931 (5th Cir. 1976) (allegations of racially oriented election campaign), *cert. denied*, 429 U.S. 1092 (1977).

Conclusion

For the reasons stated above, the Board's application for enforcement is granted, and the Company's cross-petition for review is denied.

APPLICATION FOR ENFORCEMENT GRANTED;
CROSS-PETITION FOR REVIEW DENIED.

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In The

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1991

By the Court:

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, AFL-CIO *Intervening Petitioner,* No. 90-3182 *v.* CHICAGO TRIBUNE COMPANY, *Respondent.*	Application for Enforcement of an Order of the National Labor Relations Board 13-CA-29019
CHICAGO TRIBUNE COMPANY, *Petitioner,* No. 90-3499 *v.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Cross-Petition for Review of an Order of the National Labor Relations Board 13-CA-29019

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR COURT TO TAKE JUDICIAL NOTICE" filed herein on July 8, 1991, by counsel for the Chicago Tribune Company.

2. "OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO RESPONDENT'S MOTION FOR COURT TO TAKE JUDICIAL NOTICE" filed herein on July 17, 1991, by counsel for the National Labor Relations Board.

3. "MOTION TO TAKE JUDICIAL NOTICE" filed herein on August 6, 1991, by counsel for the Chicago Tribune Company.

On consideration thereof,

IT IS ORDERED that the MOTION FOR COURT TO TAKE JUDICIAL NOTICE filed herein on July 8, 1991, by counsel for the Chicago Tribune Company is DENIED.

IT IS FURTHER ORDERED that the MOTION TO TAKE JUDICIAL NOTICE filed herein on August 6, 1991, by counsel for the Chicago Tribune Company is GRANTED and the court will take judicial notice of the National Labor Relations Board's order of July 23, 1991.

In The

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 9, 1991

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

NATIONAL LABOR RELATIONS BOARD, *Petitioner-Cross-Respondent,*	On Application for Enforcement and Cross-Petition for Review of an Order of the National Labor Relations Board.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, AFL-CIO *Intervening Petitioner,*	
Nos. 90-3182, 90-3499 *v.*	
CHICAGO TRIBUNE COMPANY, *Respondent-Cross-Petitioner.*	No. 13-CA-29019

ORDER

The respondent-cross-petitioner notes in its petition for rehearing that the court's opinion does not rule explicitly on its motion for supplementation filed on December 14, 1990. By order of January 18, 1991, the court directed that this motion be referred to the panel assigned to hear the case.

To avoid any ambiguity, we now make it clear that the motion is denied. Whatever the merits of the underlying issue, we believe that the motion was made too late in these proceedings. None of the issues set forth in the respondent-cross-petitioner's motion were raised at any point before the Board. Our precedents make it clear that we shall not consider this argument unless it is raised before the Board. *See Van Leer Containers, Inc. v. NLRB*, 841 F.2d 779, 782-83 (7th Cir. 1988); *NLRB v. Browning-Ferns Indus. of Louis-*

ville, Inc., 803 F.2d 345, 350 (7th Cir. 1986); *NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 533 (7th Cir. 1986). Nor do we believe, as respondent-cross-petitioner contends, that such a step would be a fruitless gesture. Congress has given the Board primary responsibility for the administration of the statute and its regulations are its attempt to fulfill faithfully that obligation. The Board should have been given the opportunity to interpret its rule—and to attempt to justify it—in the concrete circumstances of this case before the matter was presented to this court.

Accordingly, the petition for rehearing is granted in order to state definitively the disposition of respondent cross-appellant's earlier motion for supplementation. No other issue was raised in the petition for rehearing. Accordingly, no further action by this court is necessary.

In The

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 18, 1991

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon.

Hon.

NATIONAL LABOR RELATIONS BOARD, *Petitioner* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, *Intervening Petitioner* *v.* 90-3182 CHICAGO TRIBUNE COMPANY, *Respondent*	Application for Enforcement of an order of the National Labor Relations Board Northern District of Illinois Eastern Division

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR SUPPLEMENTATION OF RECORD TO SUPPLY OMITTED MATERIALS" filed herein on 12/14/90, by counsel for respondent.

2. "OPPORTUNITY OF THE NATIONAL LABOR RELATIONS BOARD TO RESPONDENT'S MOTION FOR SUPPLEMENTATION OF RECORD" filed herein on 12/27/90, by counsel for petitioner.

3. "REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR SUPPLEMENTATION OF RECORD" filed herein on 1/10/91, by counsel for respondent.

On consideration thereof,

Respondent asks this court to declare invalid a Board procedure and to supplement the record on appeal with various documents not included in the record. The nature of this

request makes it one best left to be resolved by the panel assigned to hear the merits of this appeal. Accordingly,

IT IS ORDERED that petitioner's motion to supplement the record on appeal is to be taken with the case. Because the Board has not had the opportunity to respond in writing to the respondent's latest argument the board is granted leave to file a brief memorandum of law addressing the issues raised in the reply memorandum. This memorandum, if any, should be filed on or before February 1, 1991. The clerk of court is directed to provide a copy of this order, together with these documents, to the merits panel when briefs are distributed.

NOT TO BE INCLUDED
IN BOUND VOLUMES

Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO TRIBUNE COMPANY *and* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Case 13-CA-29019

ORDER DENYING MOTION

On July 11, 1990, the National Labor Relations Board issued a Decision and Order.[1] Thereafter, on August 6, 1990, the Respondent filed a request for reopening of the record and reconsideration, and on August 13 and August 17, 1990, respectively, the Charging Party and General Counsel filed oppositions to the Respondent's request. On September 17, 1990 the Respondent filed a supplemental request for reopening the record and reconsideration.

Having duly considered the matter, the Board orders that the Respondent's request is denied as containing only issues previously considered by the Board.

Dated, Washington, D.C., September 21, 1990.

By direction of the Board.[2]

Joseph E. Moore

Deputy Executive Secretary

[1] 298 NLRB No. 162

[2] Member Oviatt took no part in the consideration of this matter.

298 NLRB No. 162

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Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO TRIBUNE COMPANY *and* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Case 13—CA—29019

DECISION AND ORDER

On November 7, 1989, the Acting General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 13—RC-17519. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On December 11, 1989, the General Counsel filed a Motion for Summary Judgment. On January 10, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Charging Party filed a reply to the Respondent's response.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] On May 31, 1990, the Respondent filed a motion to supplement its brief. The General Counsel and the Charging Party filed oppositions to the Respondent's motion. We grant the Respondent's motion.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election, and on its contention that the Union is not a labor organization and that the Union practices racial and sexual discrimination.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[2] We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh*

[2] In its answer to the complaint and response to the Notice to Show Cause, the Respondent contends that on information and belief the Union practices racial and sexual discrimination precluding its certification as an exclusive bargaining representative. It is well settled that allegations of racial and other types of discrimination are properly cognizable under the duty of fair representation and must be adjudicated under Sec. 8(b) of the Act and cannot constitute a defense to an 8(a)(5) proceeding. *Handy Andy, Inc.*, 228 NLRB 447, 454 fn. 56 (1977). The Respondent acknowledges this principle but urges that *Handy Andy* be overrruled. We decline to do so.

In this supplemental brief, the Respondent submitted additional evidence, consisting, inter alia, of its own newspaper article stating that the Union's business manager has been ousted from his post amid reports of a Federal grand jury investigation into charges that the Union has been involved in the sale of union cards and other irregularities, and further noting that the Union apparently has been placed under trusteeship by its International. We find this evidence, even if deemed to be probative and worthy of consideration, does not affect the validity of the Union's certification or constitute a valid defense to the Respondent's refusal to bargain.

The Respondent stipulated to the Union's labor organization status in the underlying representation case. Accordingly, there is no merit to its denial of the Union's status in its answer to the complaint. *Hood Furniture Manufacturing Co.*, 297 NLRB No. 51 (Nov. 21, 1989); *Bentson Contracting Co.*, 297 NLRB No. 27 fn. 3 (Oct. 31, 1989).

Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, an Illinois corporation, engages in the production, circulation, and distribution of a daily newspaper in the Chicago, Illinois area. During the past calendar year, the Respondent derived gross revenues in excess of $200,000, held membership in or subscribed to various interstate news services, including the Associated Press and United Press International, published various nationally syndicated features, including the comic strip "The Far Side" and columns by Ann Landers and Mike Royko, and advertised various nationally sold products, including Seiko watches and Toshiba audio electronics. During the past calendar year, the Respondent also purchased and received at its Chicago, Illinois facilities, products, goods, and materials valued in excess of $5,000 directly from points outside the State of Illinois. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held October 4, 1988, the Union was certified on June 9, 1989, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time "A" construction electricians, "A" electricians, "B" electricians, "B" apprentice electricians and leadpersons employed in the electrical maintenance department of the Employer's Freedom Center facility currently located at 777 West Chicago Avenue, Chicago, Illinois, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusals to Bargain*

On July 5, September 13, and October 2, 1989, the Union requested the Respondent to bargain, and since July 5, 1989, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after July 5, 1989, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 134, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time "A" construction electricians, "A" electricians, "B" electricians, "B" apprentice electricians and leadpersons employed in the electrical maintenance department of the Employer's Freedom Center facility currently located at 777 West Chicago Avenue, Chicago, Illinois, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 1990

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

Clifford R. Oviatt, Jr. Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 134, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time "A" construction electricians, "A" electricians, "B" electricians, "B" apprentice electricians and leadpersons employed in the electrical maintenance department of the Employer's Freedom Center facility currently located at 777 West Chicago Avenue, Chicago, Illinois, but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

CHICAGO TRIBUNE COMPANY

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 200 West Adams Street, Suite 800, Chicago, Illinois 60606-5208, Telephone 312-353-7597.

Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO TRIBUNE COMPANY *and* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO	Cases 13-CA-29019 13-RC-17519

ORDER DENYING MOTIONS

On July 11, 1990, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1] in which the Board granted the General Counsel's Motion for Summary Judgment and directed Respondent to bargain with the Union.[2] On August 6, 1990, the Respondent filed a request for reopening of the record and reconsideration of the Board's Decision. By Order dated September 21, 1990, the Respondent's request was denied as containing only issues previously considered by the Board. On October 3, 1990, the Board filed an application for enforcement of its decision and on November 13, 1990 the Respondent filed a petition for review of that decision.

Thereafter, on July 9, 1991, the Respondent filed a Motion to Reopen Record, Motion to Request Withdrawal of Petition for Enforcement, Motion to Reconsider Decision and to Order Hearing. The Respondent contends that on July 3, 1991, the plaintiffs in a lawsuit[3] filed a motion to hold IBEW Local 134 in contempt for violating the terms of a settlement agreement reached in 1984 which dealt with alleged union discrimination against Blacks and Hispanics; that the affidavit supporting the contempt motion demonstrates that the

[1] 298 NLRB No. 162.

[2] On June 9, 1989, the Board issued a Decision and Certification of Representative in Case 13-RC-17519.

[3] *Richard Ridgeway, et al.* v. *International Brotherhood of Electrical Workers Local No. 134, et al.*, No. 74-C-3045 (U.S.D.C. N.D. Ill).

Union had a policy of granting employees enhanced credentials; that the affidavit of former IBEW Local 134 official Joseph Duffy in support of the contempt motion "directly and unequivocally contradicts" a position taken by the Regional Director in the report on objections; and that the Union "has worked a fraud on the Board." The Respondent requests the Board (1) to reopen the record in the representation case in order to provide the Respondent with a hearing on its elections objections and (2) to withdraw the petition for enforcement filed with the Seventh Circuit.

As to (1), in accord with Section 10(d) of the Act, the Board may not modify or set aside its order "after a record in a case has been filed in a court. . . ." Because a petition for enforcement has been filed before the Circuit Court of Appeals for the Seventh Circuit, and the record having been filed with the court on November 14, 1990, the Board lacks jurisdiction to modify or set aside its order. As to (2), the motion filed in the aforementioned civil action is unrelated to any of the proceedings before the Board, nothing in the motion concerns the Respondent's relationship with the Union, the organizational campaign leading to the election, the certification or the Respondent's obligation to bargain. Therefore, the Board finds that withdrawal of the petition for enforcement is unwarranted. Accordingly,

IT IS ORDERED that the Respondent's Motions are denied as they lack merit or raise no contentions not previously considered.

Dated, Washington, D.C., July 23, 1991.

By direction of the Board:

Joseph E. Moore

Deputy Executive Secretary

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IN BOUND VOLUMES

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Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHICAGO TRIBUNE COMPANY *Employer* *and* LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO *Petitioner*	Case 13-RC-17519

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held October 4, 1988, and the Acting Regional Director's report and erratum recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 25 for and 14 against the Petitioner, with 1 challenged ballot, an insufficient number to effect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Acting Regional Director's findings and recommendations,[1] and finds that a certification of representative should be issued.

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[1]With respect to Objection 4, even assuming arguendo that the "union steward" was an agent of the Union, we find that his statement regarding "blackballing," if made, does not constitute objectionable conduct because, inter alia, it was made approximately two months prior to the election, was not renewed, and the evidence affirmatively shows that it was not disseminated among unit employees. Cf. *United Broadcasting Company of New York*, 248 NLRB 403 (1980).

The Employer argues that the Regional Director erred in refusing to conduct a hearing on various of its objections. We disagree.

(Footnote continued on following page)

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 134, International Brotherhood of Electrical Workers, AFL-CIO and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time "A" construction electricians, "A" electricians, "B" electricians, "B" apprentice electricians and lead persons employed in the electrical maintenance department of the Employer's Freedom Center facility currently located at 777 West Chicago Avenue, Chicago, Illinois, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., June 9, 1989.

Mary Miller Cracraft, Member

John E. Higgins, Jr., Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] *continued*
The Employer is not entitled to a hearing as a matter of right but only on those objections "which the Regional Director concludes raise substantial and material factual issues." Sec. 102.69(d) of the Board's Rules and Regulations. The Regional Director essentially determined that there were no "substantial and material factual issues" in this case and we agree.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 13

CHICAGO TRIBUNE COMPANY *Employer* and LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO *Petitioner*	Case 13-RC-17519 STIPULATION

REPORT ON OBJECTIONS

Pursuant to a petition filed on July 8, 1988, and a Stipulated Election Agreement approved on August 17, 1988, an election by secret ballot was conducted on October 4, 1988, under the direction and supervision of the Regional Director for Region 13 of the National Labor Relations Board in the following unit of employees:

> All full-time and regular part-time "A" construction electricians, "A" electricians, "B" electricians, "B" apprentice electricians and leadpersons employed in the electrical maintenance department of the Employer's Freedom Center facility currently located at 777 West Chicago Avenue, Chicago, Illinois, but excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

The results of the election were as follows:

Approximate number of eligible voters	40
Void ballots	0
Ballots cast for Petitioner	25
Ballots cast against participating labor organization	14
Valid votes counted	39
Challenged ballots	1
Valid Ballots counted plus challenged ballot	40

The challenged ballot was insufficient to affect the outcome of the election. A majority of the valid votes counted plus challenged ballots was cast for the Petitioner.

On October 11, 1988, timely objections to conduct affecting the results of the election were filed by the Employer, a copy

being duly served on the Petitioner. A copy of said Objections is attached hereto as Exhibit 1.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice to all parties to present relevant evidence, has completed the investigation of the Objections, has reviewed all statements made by witnesses, and carefully considered all other evidence submitted by the parties, and hereby issues his report thereon.

Investigation:

The Employer presented twelve bargaining unit employees and two supervisory employees who gave affidavits related to the Employer's Objections. Six additional bargaining unit employees and one non-unit employee were also interviewed. These eighteen bargaining unit employees constitute forty-five percent of the unit. In addition, the undersigned considered the other fourteen affidavits taken by Regional Office personnel from supervisors and bargaining unit employees, affidavits submitted by the Employer, all position statements, and other evidentiary submissions in Case 13-CB-12251 filed by the Employer herein and alleging as unfair labor practices many of the allegations encompassed by its Objections 2, 3, 4, 6, 7 and 10 herein. The undersigned also considered all the affidavits and evidentiary materials submitted in Case 13-CA-27767, in which the Petitioner had alleged that the Employer had unlawfully refused to recognize and bargain with the Petitioner as the collective bargaining representative of Employer's electrical employees. That charge was dismissed by the Region on the basis that, although there was a long term relationship between the Petitioner and the Employer, the relationship had never risen to the level of being a collective bargaining relationship. The petitioner subsequently filed the petition involved herein.

Introduction:

While the Region concluded in Case 13-CA-27767 that there was no exclusive collective bargaining representative

relationship between the Petitioner and the Employer under Section 9(a) of the Act, the evidence in that Case, nevertheless, showed that there was a long term relationship between the parties, the nature of which bears on some of the issues raised by the Objections considered herein.

The investigation of the unfair labor practice charge in Case 13-CA-27767 showed that there has never been a written collective bargaining agreement between the parties. The investigation further showed that the Employer had for some forty years maintained a "referral" relationship with the Petitioner, whereby the Employer obtained many of its electricians through referrals from the Petitioner's union hall.

Although there has never been a collective bargaining agreement between the parties, most, if not all, of the Employer's electricians became members of the Petitioner's union. In addition to having used the Petitioner as a source for employees, the Employer had a practice of requesting union credentials from the Petitioner for the electricians it hired.[1] When a new electrician was hired, the Employer would send a letter to the Petitioner which advised the Petitioner that the individual had been hired as an electrician and requested union credentials for the employees. Based on the

[1] The Petitioner's union has various types of credentials it may issue, including "probationary member credentials", "B" apprentice cards, "A" apprentice cards, "B" journeyman cards, and "A" journeyman cards. The "probationary member credential", also known as a "permit", is issued to individuals who are *not* full members of the union so that they may work with union members at a particular employer's facility. A "probationary member credential" only allows the bearer to work with union employees at that employer's facility. "B" apprentice cards are issued to individuals who are members of the union and are involved in a "B" apprenticeship program for maintenance electricians. Similarly, "A" apprentice cards are issued to union members who are in an "A" apprenticeship program for construction electricians. "B" journeyman cards and "A" journeyman cards are issued to union members who are maintenance and construction journeymen electricians respectively. Journeyman construction electricians are paid a higher hourly rate than maintenance electricians. The "B" and "A" apprentice and journeyman cards all give the bearer full union membership and can be used for employment purposes with any union employer.

Employer's letter the Petitioner would issue the individual a "probationary member's credential", also known as a "permit", which would allow the individual to work with other union employees. At the end of a year the Employer would send the Petitioner a second letter which advised the Petitioner that the Employer intended to continue to employ the individual as an electrician and requested journeyman credentials for the employee. Based on the Employer's letter requesting journeymen credentials, the Petitioner would issue the individual a "B" journeyman electrician's card. Although the Petitioner would issue journeyman credentials to the Employer's electricians upon request of the Employer, during most of the time that the parties maintained their "referral" relationship neither the Employer nor the Petitioner had a formal apprenticeship program for these electricians. However, in April of 1986 the Employer set up a four year apprenticeship program for "B" electricians through Triton Community College which included classroom instruction and on the job training.

union dues directly to the Petitioner. In order to assure that employee union members paid their dues the Petitioner elected union stewards from among the unit employees, whose principal duties consisted of contracting unit employees concerning arrearages in their dues. Also because there was never any collective bargaining relationship between the parties, the Petitioner's union steward at the Employer was more limited in his functions than is usually found where there is a bargaining relationship and stewards are involved in representing employees vis-a-vis the employers. Herein the Petitioner's steward primarily handled the Union's internal matters, such as collecting union dues.

Objection No. 1

The Employer alleged that since on or about July 25, 1988, agents or officers of the Petitioner promised unit employees past service credit in one of the Petitioner's collectively bargained union pension plans in exchange for support in the election.

A supervisor presented by the Employer testified that a unit employee told him that other unit employees, who had attended a union meeting, had told the unit employee that officials of the Petitioner at the meeting had said that if the Petitioner won the election the unit employees would get past pension credits from their date of hire, i.e. full pension benefits from the Petitioner for their entire period of employment with the Employer. The unit employee who allegedly related this hearsay to the supervisor was interviewed. He testified that he told the supervisor that he had heard rumors or employee shop talk about receiving past service pension credits if the Petitioner won the election. The unit employee denied telling the supervisor that he had heard from other employees that the Petitioner had promised them past service pension credit if the Petitioner won the election. The unit employee further testified that he had never heard anyone from the Petitioner say anything about past service pension credits.

The same supervisor testified that another unit employee told him that it was that employee's understanding that someone had told the guys about pension promises. The unit employee was interviewed. He testified that, based on his discussions with other unit employees concerning the differences between the Employer's pension plan and the Union's pension plan, he told the supervisor that the men would be crazy to vote for the union pension plan because it wasn't offering anything. The unit employee denied saying anything to the supervisor regarding promises by the Petitioner concerning pension benefits, as he knew of no such promises.

Another supervisor presented by the Employer, testified that during a discussion with a unit employee concerning pension information available from the Petitioner, the unit employee told the supervisor that he had been told that employees would be given past service credit, which the supervisor took to mean that employees would receive credit towards a union pension with the Petitioner from the time they first joined the union. The unit employee was interviewed and testified that no one from the Petitioner ever said anything to him about pension benefits conditioned upon the

Petitioner winning the election, or promised him any kind of pension benefits.

Although this allegation was further investigated in the interviews conducted by Board Agents with unit employees, the hearsay testimony of the two supervisors was not corroborated. As the only evidence presented in support of this allegation was uncorroborated hearsay testimony that was either unsupported or denied by the alleged declarant, I find there is no probative evidence to support this objection. Accordingly, I recommend that Employer's Objection No. 1 be overruled.

Objection No. 2 and No. 5

Under Objection No. 2, the Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner threatened unit employees with loss of union membership and/or benefits if they voted against the Petitioner in the election.

Under Objection No. 5, the Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner threatened unit employees with expulsion from membership in the Petitioner's union if the employees failed to support the Petitioner in the election.

In support of these Objections, the Employer presented one unit employee who the Employer alleged would testify that he had been told that if the Petitioner lost the election his union card would be pulled and he would have to pack up his tools and leave. However, when interviewed the employee testified that no one from the Petitioner had ever told him that if the Petitioner lost the election his union card would be pulled or that he would have to pack up his tools and leave.

Accordingly, as no evidence supporting these allegations was presented, I recommend that Employer's Objections No. 2 and No. 5 be overruled.

Objection No. 3

The Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner threatened employ-

ees with loss of their vested rights in union pension plans if they failed to support the Petitioner in the election.

A supervisor presented by the Employer testified that a unit employee told him that if the company won the election he might lose his union pension benefits. The supervisor further testified that the unit employee did not say that anyone connected with the Petitioner had told the employee that he would lose his union pension benefits if the Employer won the election. The unit employee was interviewed. He testified that no one had ever told him that if the Petitioner lost the election he would lose his union pension benefits.

As the hearsay testimony pertaining to an alleged threat of loss of vested union pension rights did itself not show any threats, was not supported by any evidence adduced in the investigation showing that any such threat was made, and was denied by the alleged declarant, I recommend that Employer's Objection No. 3 be overruled.

Objection No. 4

Under Objection No. 4, the Employer alleged that since on or about May of 1986 agents of the Petitioner threatened employees with loss of employment opportunities and/or loss of union cards necessary to such employment opportunities in the geographical area controlled by the Petitioner if the employees failed to support the Petitioner in the election.

A supervisor presented by the Employer testified that in June or July of 1986 an agent of the Petitioner telephoned him and asked to be allowed to meet with the employees to tell them that the Petitioner had negotiated the employees recent wage increase. The supervisor testified that he declined the request because the Petitioner had not negotiated the increase. The agent of the Petitioner became angry and told the supervisor that as far as he was concerned the Employer's employees would no longer be allowed to get union credentials from the Petitioner. Sometime after this conversation the supervisor sent an employee to the Petitioner with a request for union credentials, and the request was initially denied. According to the Supervisor, the agent for the Peti-

tioner then contacted the supervisor and told him that it had all been a mistake that he had intended to give the employee union credentials and that the employee could pick them up the next day, which the employee did. The supervisor further testified that the Petitioner's agent informed him that in the future he would give union credentials to anyone the Employer hired.

The alleged threat by the Petitioner's agent as testified to by the supervisor was made and remedied prior to the critical period for objectionable conduct. Further, the threat was not alleged to have been made in the presence of any unit employees or rejuvenated by the Petitioner during the critical period.

Another supervisor presented by the Employer testified that in his view it was the general opinion of unit employees that if they left the Employer they would not be able to gain employment in the Chicago area or maintain their union cards because they had demonstrated allegiance to the Employer by crossing another union's picket line during a strike against the Employer in the past. The supervisor testified that he could not recall from whom he had heard this opinion, and further testified, that no employees had told him of any specific threats by the Petitioner concerning their ability to gain employment in the Chicago area or maintain their union cards.

A unit employee testified that he had heard a rumor around September 5, 1988 from other unit employees that if the Petitioner lost the election the unit employees would be blackballed from working in other union shops in the Chicago area. The unit employee further testified that no one from the Petitioner had ever stated this to him.

Another unit employee testified that he had heard an employee, who was known as the union steward for the Petitioner, state to a group of employees sometime in August 1988, that if the Petitioner doesn't get in they are going to "blackball" the employees from working in any union shops in the area. The unit employee testified that this was the only occasion on which he heard the union steward make such a statement and that, although he later discused the possibil-

ity of being "blackballed" with other unit employees, he did not tell the other employees that he had heard from the Petitioner's steward that the Petitioner would "blackball" employees if it lost the election.

The same employee recalled two unit employees who were present and another unit employee and a non-unit employee who may have been present when this statement concerning "blackballing" was allegedly made by the Petitioner's union steward. The three unit employees and the non-unit employee were interviewed, and none of these employees recalled hearing the union steward make the alleged statement concerning the unit employees being "blackballed" by the Petitioner if the Petitioner lost the election. The union steward was also interviewed and he denied making the alleged statement.

However, assuming *arguendo* that the "union steward" did make the alleged "blackballing" statement to other unit employees sometime in August 1988, this statement does not constitute objectionable conduct in the circumstance herein under the criteria outlined by the Board in *Westwood Horizon Hotel*, 270 NLRB 802, 803 (1984).

> In determining the seriousness of a threat, the Board evaluates not only the nature of the threat itself, but also whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capacity of carrying out the threat; and whether the threat was "rejuvenated" at or near the time of the election [citations omitted].

Applying the foregoing factors to the consideration of the alleged threat herein, the alleged threat, if made, did not interfere with the voters' choice in the election. First, the alleged threat attributing "blackballing" to the Petitioner was made several months prior to the election, was not disseminated to other employees, and was not renewed prior to the election. Thus, while employees may have discussed being "blackballed" during the election campaign this discus-

sion was merely employee speculation which was never linked to any threat, overt or implied, by anyone from or associated with the Petitioner. If the Board were to consider mere employee speculation of the possibility of retaliation by the losing party to an election as objectionable conduct, it would be impossible to conduct valid elections. Second, it is highly unlikely that the threat could be carried out by the Union as it does not operate an exclusive hiring hall, and it does not make hiring decisions for employers. To the extent that union credentials, e.g. union membership cards indicating journeyman status or apprentice status, may affect employment opportunities, the alleged threat rings hollow as the Petitioner's constitution and by-laws make it clear that the only grounds for revoking an individual's union card is the non-payment of union dues. Third, the single alleged threat adduced during the entire investigation of the objections was allegedly made by the lowest possible representative of the Petitioner, a fellow employee of the unit employees, of whom it is very unlikely that the employees acted in fear of his capacity to carry-out the alleged threat or even to speak knowledgeably on behalf of the Petitioner.

Accordingly, I find that the probative evidence does not support a finding that the Petitioner threatened employees with the loss of employment opportunities or union cards if they failed to support the Petitioner in the election; and *even assuming arguendo* that a threat was made by the union steward as alleged by one witness, such a threat did not interfere with the election as the threat was not disseminated, occurred months prior to the election, and was not made by someone with the apparent authority to carry it out. I therefore, recommend that Employer's Objection No. 4 be overruled.

Objection No. 6

The Employer alleged that since on or bout July 25, 1988 agents and/or officers of the Petitioner promised apprentice electricians in the unit accelerated change to journeyman status in exchange for their support in the election.

A supervisor presented by the Employer testified that he was told by a unit employee that other employees, who had

attended a union meeting in July 1988, had said that officials of the Petitioner had stated at the meeting that the apprentices would be upgraded to journeymen. The unit employee who allegedly related this hearsay to the supervisor was interviewed. He denied having told the supervisor that he had heard that the Petitioner had said the apprentices would be upgraded to journeymen. The employee testified that he told the supervisor that he had heard rumors or employee shop talk that the apprentices might be upgraded to journeymen. The employee further testified that he had never heard anyone from the Petitioner say that apprentices would be upgraded to journeymen if the Petitioner won the election.

Although further investigated in the interviews conducted by Board Agents with unit employees, the hearsay testimony of the supervisor was not corroborated. As the only evidence proffered in support of this allegation was uncorroborated hearsay testimony that was denied by the alleged declarant, I find there is no probative evidence to support this objection. Accordingly, I recommend that Employer's Objection No. 6 be overruled.

Objection No. 7

The Employer alleged that since on or about July 25, 1988 the Petitioner offered apprentice electricians "B" apprentice cards, a credential the Petitioner previously denied being available for the apprentices.

A supervisor presented by the Employer testified that in April 1986, around the time the Employer initiated an apprenticeship program through Triton Community College, he spoke to a business agent of the Petitioner and informed him that the Employer was starting an apprenticeship program for "B" apprentices. The supervisor testified that he requested apprentice cards for the three apprentices who were being hired for the apprenticeship program. According to the supervisor, in response to his request, the Petitioner's business agent told him that there were no "B" apprentice cards in Chicago. The supervisor testified that he asked the Petitioner's agent what could be done, and the agent said he would issue the apprentices "B" permits. The supervisor tes-

tified that he asked the Petitioner's agent how the apprentices' status would change and the Petitioner's agent replied that the apprentices would maintain their "B" permits during the four years of the employer's apprenticeship program, and at the end of the four year program they would be issued "B" journeyman cards, after the Petitioner was notified by the Employer of their completion of the apprenticeship program.

The Petitioner's business agent was interviewed. He denied telling the Employer's supervisor that "B" apprentice cards were not available in Chicago. The Petitioner's agent did not recall the supervisor ever asking about "B" apprentice cares for the apprentices in the Employer's then new apprenticeship program. He stated that if such a request had been made he would have agreed to provide apprentice cards to the apprentices after they had completed a year of the apprenticeship program as had been done in the past when the Petitioner provided journeyman cards upon request of the Employer to employees who had worked for the Employer for a year on probationary union credentials known as "permits".

A supervisor presented by the Employer testified that a unit employee told him that another employee, who had attended a union meeting, had said that at the meeting the apprentices had been promised union cards by a business agent of the Petitioner if the Petitioner won the election. The unit employee who attended the union meeting was interviewed. He testified that at the union meeting two of the apprentices asked the Petitioner's business agent what their status would be if the union did not win the election. The unit employee testified that the Petitioner's agent responded by asking the apprentices how long they had been on permits. When he was told by the apprentices that they had been on permits for about 2½ years, the Petitioner's business agent stated that the apprentices should have been on cards. The unit employee could not recall if the Petitioner's agent specified what type of card the apprentices should have been on. The unit employee testified that the Petitioner's business agent told the apprentices that if they had the money he would issue them cards right now, no questions asked. The

unit employee did not know if the apprentices were issued cards that day or what type of cards they were issued, i.e. apprentice or journeyman cards.

The two apprentices, who attended the above described union meeting, were interviewed. They testified that they had asked the Petitioner's business agent if they would still be able to get their journeyman cards after completing the four year apprenticeship program, because they had been told by the Employer that the Employer would not request journeyman cards for them when they completed the apprenticeship program because the employer no longer recognized the Petitioner. According to the apprentices, the Petitioner's business agent asked them how long they had worked under permits and verified that they had been on permits for 2½ years through union records. The apprentices stated that the Petitioner's agent told them that they should have been issued "B" apprentice cards after completing a year in the apprenticeship program.[2] The business agent took the three apprentices before the Petitioner's executive board and explained that the apprentices had been working on permits for 2½ years and that the Employer was no longer sending the Petitioner letters after a year requesting union cards for employees as had been done in the past. The Petitioner's executive board approved the issuance of "B" apprentice cards to the apprentices, because the "probationary member credentials" or "permits" the apprentices had been working under merely certified them as probationary members of the local union, and the Petitioner's consti-

[2] There are three apprentices in the Employer's apprenticeship program. All three of the apprentices were interviewed as part of the investigation. Two apprentices attended one union meeting while the other apprentice attended another union meeting held the same day. All three of the apprentices asked the Petitioner's business agent about getting their journeyman cards after completing the apprenticeship program at the meetings they attended. All three of the apprentices were asked by the business agent how long they had been in the apprenticeship program. After their time in the program was verified, the three apprentices were taken as a group before the Petitioner's executive board for approval of the issuance of "B" apprentice cards to them. All three apprentices were issued "B" apprentice cards based on the executive board's approval.

tution requires that after a year, apprentices be admitted to membership. After the Petitioner's executive board approved the issuance of "B" apprentice cards to the apprentices, the Petitioner's business agent told the apprentices that they could get their cards now if they had the money, i.e. initiation fees and dues. The three apprentices were issued "B" apprentice cards by the Petitioner upon payment of their initiation fees and dues.

The evidence presented in support of this allegation does not show that the apprentices were offered "B" apprentice cards in exchange for their support in the election. Rather, the evidence shows that the apprentices were issued "B" apprentice cards by the Petitioner based on the past practice between the parties and the requirements of the Petitioner's constitution. Further, rather than being issued "B" journeyman cards as had been done upon the Employer's request in the past after an employee had worked on a "probationary member credential" as an electrician for a year, the apprentices were appropriately issued "B" apprentice cards as they were still in the Employer's apprenticeship program. Accordingly, I recommend that Employer's Objection No. 7 be overruled.

Objection No. 8

The Employer alleged that since on or about July 25, 1988 agents or officers of the Petitioner promised employees holding "B" electrician (journeyman) credentials upgrades to "A" electrician (journeyman) credentials in exchange for their support in the election.

An Employer supervisor testified that he was told by a unit employee that other employees, who had attended a union meeting, had said that officials of the Petitioner had stated at the meeting that the "B" journeymen would be upgraded to "A" journeymen. The supervisor further testified that neither this employee nor any other employee had ever told him that the Petitioner conditionally promised upgrades from "B" journeymen to "A" journeymen based upon the Petitioner winning the election. The unit employee

who allegedly related this hearsay to the supervisor was interviewed. He testified that he told the supervisor that he had heard rumors or employee shop talk that "B" journeymen might be upgraded to "A" journeymen. The employee denied that he had told the supervisor that he had heard that the Petitioner had promised to upgrade "B" journeymen to "A" journeymen. The unit employee further testified that he had never heard anyone from the Petitioner state that "B" journeymen would be upgraded to "A" journeyman if the Petitioner won the election.

A unit employee holding a "B" journeyman card was presented by the Employer who alleged that the employee would testify that he had been offered an "A" journeyman card if the Petitioner won the election. The unit employee testified that no one from the Petitioner ever said anything to him about getting an "A" journeyman card or offered him an upgrade to an "A" card if the Petitioner won the election.

A supervisor presented by the Employer testified that a unit employee told him that other unit employees had said that if the Petitioner won the election their "B" journeyman cards would be upgraded to "A" journeyman cards. The unit employee who allegedly related this hearsay to the supervisor was interviewed. He testified that he had heard employee shop talk that if the Petitioner won the election those employees with "B" journeyman cards would be upgraded to "A" journeyman cards. The unit employee further testified that no one from the Petitioner ever told him that he would be upgraded from a "B" journeyman card to an "A" journeyman card if the Petitioner won the election.

Although further investigated in the interviews conducted by Board agents with unit employees, the hearsay testimony of the two supervisors was uncorroborated. As the only evidence presented in support of this allegations was unsupported hearsay testimony, statements denied by the alleged declarant or plant rumors which were not shown to be attributable to the Petitioner, I find there is no probative evidence to support this objection. Accordingly, I recommend that Employer's Objection No. 8 be overruled.

Objection No. 9

The Employer alleged that since on or about October 3, 1988, agents and/or officers of the Petitioner guaranteed increased wages, increased fringe benefits and improved working conditions to unit employees and guaranteed jobs at other unionized companies in exchange for their support in the election.

Two Employer supervisors testified that they had telephone conversations with the same unit employee on the evening of October 3, 1988 after the unit employee had attended a union meeting held by the Petitioner. One of the supervisors testified that the unit employee, who sounded rather shaken over the phone, told him that a question had been asked at the union meeting concerning what guarantee the employees would have that they would retain their current salary and benefits if the Petitioner won the election. The unit employee stated that union officials cited a number of cases in which the union had prevailed and said that salaries and benefits had time period when the parties would be engaged in contract negotiations. The unit employee testified that no one from the Petitioner said that wages and benefits could only get better or that they could go down. The unit employee further testified that he did not tell the supervisor that the Petitioner had said that wages and benefits could only go up and could not go down. The unit employee said he told the supervisor that the Petitioner had said that everything had to stay the same during negotiations. Finally, although no specific evidence was presented by the Employer concerning promises of guaranteed jobs at other union companies, this unit employee testified that no such promises had been made by the Petitioner.

Several other unit employees who attended the same union meeting on October 3, 1988 were interviewed and corroborated the earlier testimony that the Petitioner's representatives stated that wages and benefits could not be changed during the time when the parties were engaged in contract negotiations if the Petitioner won the election. They also testified that the Petitioner's representatives did not

state that wage and benefits could only improve if the Petitioner won the election. These unit employees further testified that the Petitioner's agents had not promised guaranteed jobs at other union companies if they supported the Petitioner in the election.

In further support of this objection a supervisor presented by the Employer testified that about a week prior to the election a unit employee mentioned to him that he was very concerned about the Employer's performance review process and whether he was going to get a fair shake. The unit employee stated that he was concerned because during previous meetings with the Employer, the Employer had stated that if layoffs occurred they would be determined by job performance, training and ability, and length of service. The supervisor testified that the unit employee's concern implied to him that the Petitioner had promised the unit employees seniority status. The supervisor further testified that he told the unit employee that the Petitioner could not guarantee seniority would be considered in layoffs, that it was a negotiable item. The unit employee was interviewed. He stated that, although he did not recall the specific conversation, he had told the supervisor that seniority rights were probably one of the things the employees would like to have. The unit employee did confirm that the supervisor had told him that seniority rights were a negotiable item. The unit employee further stated that the Petitioner had never promised the employees seniority rights, but had told them that they would try to get them seniority rights in contract negotiations.

Another supervisor testified that a unit employee told him that the employees' union benefits would include union seniority. The supervisor did not claim that the unit employee had stated that the Petitioner had made any promises to the unit employees concerning seniority. The unit employee was interviewed. He testified that the Petitioner had told the employees that a seniority clause was a negotiable item and had never promised to get such a clause in any contract negotiated with the Employer. The unit employee further testified that he had never told the supervisor that union benefits included seniority.

The investigation of the evidence presented by the Employer failed to support the allegations that Petitioner had promised unit employees that wages, benefits and working conditions would improve, that unit employees were guaranteed jobs with other union companies or that unit employees had been promised a seniority clause in any contract negotiated with the Employer if they supported the Petitioner. Accordingly, I recommend that Employer's Objection No. 9 be overruled.

Objection No. 10

The Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner promised to waive and/or ignore internal union procedures, rules and regulations in upgrading union credentials in the possession of unit employees, thereby coercing such employees to support the Petitioner in the election.

The evidence presented in support of this Objection is the same evidence that was presented in support of Objections No. 6, No. 7 and No. 8. Again, I find that this testimony is not sufficient to support this Objection. Accordingly, I recommend that Employer's Objection No. 10 be overruled.

Objections No. 11 and No. 12

Under Objection No. 11, the Employer alleged that since on or about September 2, 1988 agents and/or officers of the Petitioner threatened, coerced and intimidated unit employees to encourage them not to cooperate with agents of the National Labor Relations Board with respect to an investigation of charges filed alleging unlawful conduct by the Petitioner during the election campaign.

Under Objection No. 12, the Employer alleged that since on or about September 8, 1988 agents and/or officers of the Petitioner inhibited an investigation of the National Labor Relations Board by threatening and intimidating unit employees in the exercise of their Section 7 rights.

In support of Objections No. 11 and No. 12 the Employer presented one supervisor. The supervisor testified that he

was the individual who, during the investigation of the Board charges that the Employer had filed against the Petitioner, escorted the unit employees to the Employer's quality control laboratory officer to talk to the Board agent conducting the investigation. The supervisor testified that he got the feeling from comments made by some of the individuals he escorted later in the investigation, that they had been told not to cooperate with the NLRB. The supervisor testified that none of the unit employees had said that they had been told not to cooperate, but he inferred this from comments they made such as, "well don't worry I'll be back to work quickly, I'm not going to say anything."

Inasmuch as the supervisor's subjective inference of comments made by unit employees does not constitute probative evidence, and there is no direct evidence of unit employees being threatened, coerced or intimidated by the Petitioner in order to prevent them from cooperating during the investigations by the National Labor Relations Board, especially in light of the number of employees who were interviewed and gave affidavits, I find the supervisor's subjective inference is not sufficient to support these objections. Accordingly, I recommend that Employer's Objections No. 11 and No. 12 be overruled.

Additional Allegations of Objectionable Conduct

Although not specifically alleged in the Employer's Objections, the Employer's witnesses did present testimony concerning other conduct by the Petitioner which may have affected the results of the election.

A supervisor testified that unit employees, whose names he could not recall, told him that they were concerned that if the Employer won the election, the Employer would cut wages and benefits. The supervisor testified that he told these employees that the Employer had a policy of paying competitive wages to maintain a quality work force, and that the Employer had never cut a salaried group's wages. The Supervisor identified one unit employee who allegedly had told him that he had received a letter from the Petitioner which stated that if the Employer won the election it would

cut wages to minimum wage and cut benefits to the bone. The unit employee identified by the supervisor was interviewed. He testified that none of the campaign literature that he received from the Petitioner contained any statements regarding the Employer cutting wages or benefits if it won the election. Other unit employees interviewed confirmed that none of the Petitioner's campaign letters that they had received stated that the Employer would cut wages and benefits if it won the election.

Although further investigated through interviews with unit employees the supervisor's hearsay testimony was not corroborated, and was denied by the alleged declarant. Further, mere comments by unit employees expressing concern that the Employer would cut wages and benefits if it won the election do not constitute objectionable conduct by the Petitioner, where such statements predicting Employer actions have not been shown to be attributable to the Petitioner. Even assuming arguendo, that such a statement was made by the Petitioner and/or that the Petitioner distributed campaign literature containing the alleged statement, such a statement does not constitute objectionable conduct or a basis upon which to set aside an election, as the Board no longer probes into the truth or falsity of the parties' campaign statements except in the case of the use of forged documents, which has not been alleged herein. *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) accordingly, I recommend that this Objection be overruled.

CONCLUSION

For the reasons set forth heretofore, I recommend that the Employer's Objections be overruled in their entirety, and that Certification of Representative issue.[3]

DATED at Chicago, Illinois this 12th day of December, 1988.

/s/ WILLIAM G. KOCOL

William G. Kocol, Acting Regional Director
National Labor Relations Board
Region 13
Everett McKinley Dirksen Building
219 South Dearborn Street, Room 881
Chicago, Illinois 60604

Attachments

[3] Under the provisions of Section 102.69 of the Board's Rules and Regulations exceptions to this report may be filed with the Board in Washington, D.C. Pursuant to Section 102.69(g), affidavits and other documents which a party has submitted timely to the Regional Director in support of the objections are not a part of the record unless included in the Regional Director's Report or appended to the exceptions or opposition thereto which a party submits to the Board. Exceptions must be received by the Board in Washington by December 23, 1988.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 13

CHICAGO TRIBUNE COMPANY *Employer* and LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO *Petitioner*	Case 13-RC-17519 STIPULATION

ERRATUM

On December 12, 1988 a Report on Objections issued in the above matter in which the word "employee" was misspelled at the end of the first sentence at the top of page 4. This sentence currently reads:

> "letter to the Petitioner which advised the Petitioner that the individual had been hired as an electrician and requested union credentials for the employees."

The sentence should read:

> "letter to the Petitioner which advised the Petitioner that the individual had been hired as an electrician and requested union credentials for the employee."

Further, the beginning of the sentence at the top of page 5 was omitted. The sentence currently reads:

> "union dues directly to the Petitioner."

The sentence should read:

> "Inasmuch as there was never a collective bargaining agreement between the parties there was no check-off provision for union dues, and the Employer's electrical employees who were union members had to pay their union dues directly to the Petitioner."

Finally, the word "about" is misspelled in the first sentence of the first paragraph under Objection No. 6 on page 12. The sentence currently reads:

> "The Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner promised apprentice electricians in the unit accelerated change to journeyman status in exchange for their support in the election"

The sentence should read:

> "The Employer alleged that since on or about July 25, 1988 agents and/or officers of the Petitioner promised apprentice electricians in the unit accelerated change to journeyman status in exchange for their support in the election."

DATED at Chicago, Illinois this 14th day of December, 1988.

/s/ WILLIAM G. KOCOL

William G. Kocol, Acting Regional Director
Region 13
Everett McKinley Dirksen Building
219 South Dearborn Street, Room 881
Chicago, Illinois 60604

In The

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 14, 1992

Before
Hon. KENNETH F. RIPPLE, *Circuit Judge*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 134, AFL-CIO *Intervening Petitioner,* No. 90-3182 *v.* CHICAGO TRIBUNE COMPANY, *Respondent.*	Application for Enforcement of an Order of the National Labor Relations Board 13-CA-29019
CHICAGO TRIBUNE COMPANY, *Petitioner,* No. 90-3499 *v.* NATIONAL LABOR RELATIONS BOARD, *Respondent.*	Cross-Petition for Review of an Order of the National Labor Relations Board 13 CA 29019

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO STAY MANDATE" filed herein on 1/3/92, by counsel for Chicago Tribune Company.

2. "RESPONSE TO MOTION TO STAY MANDATE" filed herein on 1/14/92, by counsel for National Labor Relations Board.

3. "INTERVENOR'S OPPOSITION TO MOTION TO STAY MANDATE" filed herein on 1/13/92, by counsel.

On consideration thereof,

IT IS ORDERED that the "MOTION TO STAY MANDATE" is DENIED.

Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1452

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHICAGO TRIBUNE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate Geenral Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board properly determined that allegations of racial discrimination against a union may not be raised by an employer to challenge the union's certification as a collective bargaining representative, but, instead, should be adjudicated in unfair labor practice proceedings against the union.

2. Whether the court of appeals erred in enforcing the Board's order without requiring supplementation of the administrative record.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1452

CHICAGO TRIBUNE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) and its order on rehearing (Pet. App. A16-A17) are reported at 943 F.2d 791. The decision and order of the National Labor Relations Board (Board) (Pet. App. A21-A28) is reported at 298 N.L.R.B. No. 162. The Board's Decision and Certification of Representative (Pet. App. A31-A32) and Report on Objections of the Board's Regional Director (Pet. App. A33-A55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1991. A petition for rehearing was granted on December 9, 1991, and the court entered an order on that date clarifying its denial of petitioner's motion for supplementation of the record. Pet. App. A16-A17. The petition for a writ of certiorari was filed on March 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the publisher of a daily newspaper in Chicago, Illinois. For approximately four decades, petitioner obtained many of its electricians through referrals from the union hall of Local 134, International Brotherhood of Electrical Workers (Union). Most of petitioner's electricians became members of the Union. During that time, however, petitioner did not have a formal collective bargaining relationship with the Union. Pet. App. A35.

In July 1988, based on the Union's petition, the Board held a representation election among petitioner's electricians. The Union won the election by a vote of 25 to 14. Pet. App. A33. Petitioner filed objections to the conduct of the Union during the election. The objections alleged, *inter alia*, that the Union had threatened the employees with loss of Union pension benefits, had threatened to "blackball" employees from working in other union shops if they did not support the Union, and had promised and granted enhanced Union benefits in return for support in the election. *Id.* at A36-A50.

The Regional Director, based on an administrative investigation in which the parties were permitted to submit evidence, overruled the objections and recom-

mended that the Union be certified as the representative of petitioner's electricians. Pet. App. A34, A53. In the investigation, the Regional Director considered the affidavits of twelve employees and two supervisors submitted by petitioner, as well as testimony and affidavits obtained by Regional Office personnel. *Id.* at A34. The Regional Director concluded that there was no probative evidence to support the allegations concerning union benefits. *Id.* at A38-A39, A43-A50. The Regional Director further concluded that the "blackballing" threat, assuming that it occurred, would not be grounds to set aside the election because it was made several months before the election and was not disseminated to the employees. *Id.* at A41. In accordance with Board rules, the Regional Director therefore determined that petitioner's objections failed to raise issues warranting a hearing.[1]

Petitioner filed exceptions with the Board, challenging the Regional Director's decision and contending that it was entitled to an evidentiary hearing on various of its objections. Pet. App. A31 n.1. The Board adopted the Regional Director's findings and certified the Union. In light of the administrative record, the Board agreed with the Regional Director that petitioner's objections raised "no 'substantial and material factual issues' " that would entitle it to a hearing on its objections. *Id.* at A31-A32 n.1.[2]

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[1] The Board's Rules and Regulations provide that the Regional Director may resolve objections without holding an evidentiary hearing if the objections fail to "raise substantial and material factual issues." 29 C.F.R. 102.69(d).

[2] The administrative record contained the affidavits submitted by petitioner to the Regional Director, which petitioner put before the Board pursuant to 29 C.F.R. 102.69 (g) (3). The administrative record did not contain the wit-

2. Petitioner refused to bargain with the Union, and the Union filed unfair labor practice charges. The Board held that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and entered a bargaining order. Pet. App. A24-A25. The Board found that all issues raised by petitioner in objection to the Union's certification were or could have been litigated in the underlying representation proceeding and that petitioner did not offer to adduce any newly discovered or previously unavailable evidence, nor did it allege any special circumstances that would require the Board to reexamine the decision made in that proceeding. *Id.* at A22-A23.

The Board refused to consider petitioner's allegation that "on information and belief the Union practices racial and sexual discrimination." Pet. App. A22 n.2. In so doing, the Board rejected petitioner's request that it overrule its decision in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), in which the Board had held that "allegations of racial and other types of discrimination are properly cognizable under the duty of fair representation and must be adjudicated under Sec. 8(b) of the Act and cannot constitute a defense to an 8(a)(5) proceeding." Pet. App. A22 n.2.

3. The court of appeals enforced the Board's order. Pet. App. A2. After reviewing petitioner's objections, the court found that substantial evidence

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ness statements gathered independently by the Regional Director in his investigation, because the Board's rules provide that the record consists, *inter alia*, of "documentary evidence, *excluding statements of witnesses*, relied upon by the Regional Director in his decision or report." 29 C.F.R. 102.69(g)(1)(ii) (emphasis added). See *Summa Corp.*, 265 N.L.R.B. 343 (1982), enforced, 734 F.2d 21 (9th Cir. 1984) (Table).

supported the Board's determination that petitioner did not present a prima facie case for setting aside the election. The court of appeals therefore held that the Board properly concluded that petitioner was not entitled to an evidentiary hearing on its objections. *Id.* at A5-A11.

The court of appeals also rejected petitioner's assertion that "the regional director erred by resolving credibility disputes on the basis of his *ex parte* interviews." Pet. App. A10. The court noted that it was petitioner's burden to "proffer 'specific evidence from or about specific people' " indicating that the election had been affected by particular conduct. The court agreed with the Board, however, that petitioner "proffered no specific evidence of conduct sufficient to set aside the election." *Ibid.* The court explained that "our review of the record indicates that the hearing officer accepted as true the Company's allegations, but considered these allegations insufficient to set aside the election." *Ibid.*[3]

Finally, the court of appeals rejected petitioner's contention that the Board should have accorded it a hearing on its allegation that the Union discriminates against employees based on race. The court noted

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[3] Petitioner had filed a motion with the court of appeals seeking supplementation of the record with the materials that the Regional Director had considered but had not transferred to the Board as part of the administrative record. The motion was referred to the panel assigned to hear the merits of the case. Pet. App. A18-A19. The court of appeals did not explicitly address the motion in its opinion, but subsequently granted petitioner's petition for rehearing for the limited purpose of denying the motion. The court did not reach the merits of the motion, because it concluded that, as petitioner had not raised its objection to the content of the administrative record before the Board, it could not raise the issue for the first time before the court. *Id.* at A16-A17.

that in *Handy Andy*, the Board had established that "employer allegations of union racial discrimination will not be entertained as a defense to a refusal to bargain [charge] unless that allegation relates to unfairness in the election itself." Pet. App. A11. The Board found that petitioner "ha[d] not provided concrete evidence that the alleged union discrimination was in any way related to the election or the pre-election campaign." *Id.* at A12. The court disagreed with petitioner that the Board's *Handy Andy* policy "ha[d] not been favorably received by the courts," noting that "no court has explicitly rejected *Handy Andy*" and that the cases cited by petitioner as rejecting it are "easily reconciled with *Handy Andy*." *Id.* at A12 n.9.

ARGUMENT

1. Petitioner contends (Pet. 15-24) that the Board's rule in *Handy Andy*, 228 N.L.R.B. 447 (1977), that an employer may not object to certification of a union on the theory that the union practices racial discrimination is incorrect, and that the court of appeals' endorsement of that rule conflicts with decisions of other courts of appeals. The Board's decision in *Handy Andy* represents a reasonable interpretation of the Act and review of this issue is not warranted.

a. In *Handy Andy*, the Board overruled its decision in *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974), and held that, unless racial discrimination by the union relates to unfairness in the election process, an employer's allegation of union racial discrimination will not be entertained prior to certification of a union (or as a defense to a refusal to bargain with the certified union). The Board concluded that the policies of the Act are better effectu-

ated by considering allegations that a labor organization practices invidious discrimination in separate unfair labor practice proceedings against the union under Section 8(b) of the Act, 29 U.S.C. 158(b), rather than in a representation proceeding and the related unfair labor practice proceeding under Section 8(a)(5), 29 U.S.C. 158(a)(5).[4] 228 N.L.R.B. at 448.

The Board rejected the view that the Constitution requires the Board to determine whether a union practices discrimination prior to certifying it as the representative of the employees. The Board explained that certification is simply "an acknowledgment that a majority of the employees in an appropriate bargaining unit have selected the union as their exclusive bargaining representative." 228 N.L.R.B. at 450. The Board added that, "while use of Board processes and the Board's certification may have helped a union gain the powers of bargaining representative established by the Act, the union has not been authorized to discriminate in the exercise of those powers." *Ibid.* Indeed, "the duty of fair representation in its various forms *specifically prohibits* a union from practicing unlawful discrimination under the authority of the Act." *Ibid.*[5]

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[4] When an employer refuses to bargain in order to test the validity of the union's certification, the unfair labor practice proceeding under Section 8(a)(5) for failure to bargain and the prior representation proceeding "are really one." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 158 (1941).

[5] The Board noted, 228 N.L.R.B. at 455-456, that invidious discrimination by a union in various guises violates Section 8(b)(1)(A), (2), and (3) of the Act ,29 U.S.C. 158(b)(1)(A), (2) and (3). See, *e.g.*, *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). The Board also noted that it is authorized to revoke the certification of a union that practices invidious discrimi-

The Board also concluded that allowing the employer to litigate the union's racial practices in the representation proceeding would "significantly impair the national labor policy of facilitating collective bargaining." 228 N.L.R.B. at 452. First, such a rule would deny unit employees the right guaranteed in Section 7 of the Act, 29 U.S.C. 157, to bargain collectively through their chosen representative. 228 N.L.R.B. at 452. Second, such a rule would promote delay in the representation process by providing employers "with an incentive to inject charges of union racial discrimination into Board certification and bargaining order proceedings as a delaying tactic in order to avoid collective bargaining altogether rather than to attack racial discrimination." *Id.* at 453.

Petitioner suggests (Pet. 24) that it would be a "better rule" if the Board were to permit employers to avoid the obligation to bargain collectively where the elected union has in the past engaged in discrimination. That claim reflects petitioner's disagreement with the Board's balance of the competing policies, and its doubts about whether the duty of fair representation is adequate to protect employees against discrimination. Pet. 14, 22-24. It is for the Board, however, to balance the competing policies of the Act. See, *e.g.*, *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2222 (1991). While racial discrim-

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nation with respect to bargaining unit employees. See *Independent Metal Workers Union, Local No. 1*, 147 N.L.R.B. 1573 (1964). In the Board's judgment, unfair labor practice proceedings alleging a breach of the union's duty of fair representation provide a superior way to consider allegations of discrimination, for that process "affords the charged party [the union] the full panoply of due process of law without at the same time denying or delaying the employees' right to the services of their designated bargaining agent." 228 N.L.R.B. at 448.

ination is offensive in all of its manifestations, the Board's approach is in keeping with this Court's recognition that "[t]he central purpose of the Act [is] to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991).[6]

The Board's *Handy Andy* policy is constitutional; the certification of the union does not endorse, authorize, or sponsor past or future racial discrimination. This Court has observed that it would raise constitutional concerns if a union were certified to act as the exclusive representative of employees without simultaneously having a duty of fair representation that prohibits arbitrary or invidious action with respect to represented employees. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 198-199 (1944). The Court has never suggested, however, that the Constitution, or any other source of federal law, requires that a union that has fairly won an election be denied representative status because it has engaged in racial discrimination in the past.

b. As the court of appeals observed, "no court has explicitly rejected *Handy Andy*." Pet. App. A12 n.9.

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[6] In a different context, this Court has recognized that the "right to be free of racial discrimination * * * cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 69 (1975). In holding that employees were not entitled to bypass their collective bargaining agent and bargain directly with their employer over conditions of employment as they affected racial minorities, the Court explained that the duty of fair representation, enforced through unfair labor practice proceedings, provides adequate "safeguards for the protection of minority interests." *Id.* at 65.

Indeed, the decision below is the first published opinion in more than a decade to address the issue. Moreover, it accords with *Bell & Howell Co.* v. *NLRB*, 598 F.2d 136 (D.C. Cir.), cert. denied 442 U.S. 942 (1979), which is the only other decision that squarely considered the validity of *Handy Andy*. In *Bell & Howell*, the court of appeals held that the National Labor Relations Act does not require the Board "to consider allegations of discrimination prior to certifying a victorious union, at least where the proffered evidence of discrimination relates to past union misconduct outside the bargaining unit that the union seeks to represent." 598 F.2d at 148. The court rejected the claim that the Board's certification of a union charged with prior acts of discrimination would "authorize," "encourage," or "significantly involve[]" the government in such discrimination in violation of the Fifth Amendment. *Id.* at 149. The court pointed out that "[f]ar from authorizing and encouraging discrimination, certification subjects the union to additional sanctions for any future discrimination," including cease and desist orders and monetary remedies for victims of discrimination. *Ibid.*[7]

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[7] The court of appeals reserved the issue of "whether a different result is required where the union's constitution or by-laws, or explicit conduct in a representation election, establish that the union will discriminate in the unit in question." *Bell & Howell*, 598 F.2d at 150 n.46. That issue is not presented in this case. See Pet. App. A12. Moreover, petitioner errs in claiming (Pet. 20) that the reserved issue in *Bell & Howell* implies that the court of appeals adopted "a different variation of the *Handy Andy* rule." The Board's decision in *Handy Andy* left open the possibility that evidence of racial discrimination could be considered in representation proceedings where it had a direct impact on the fairness of the elec-

Contrary to petitioner's assertion (Pet. 17-20), the Fifth and Ninth Circuits have not rejected *Handy Andy*. In *Natter Mfg. Corp.* v. *NLRB*, 580 F.2d 948, 951-952 n.2 (9th Cir. 1978), cert. denied, 439 U.S. 1128 (1979), the court found it unnecessary to reach "the correctness of the Board's *Handy Andy* rule," concluding that the Board had properly declined to provide the employer with a hearing because it had not presented a *prima facie* case that the union had engaged in racial discrimination. In two subsequent cases, the Ninth Circuit noted that it had not resolved the *Handy Andy* issue. See *Polynesian Cultural Center, Inc.* v. *NLRB*, 582 F.2d 467, 477 n.5 (1978); *Graphic Arts Int'l Union, Local No. 380* v. *NLRB*, 596 F.2d 904, 912-913 n.11 (1979). In *NLRB* v. *Heavy Lift Service, Inc.*, 607 F.2d 1121 (1979), cert. denied, 449 U.S. 822 (1980) (Pet. 19), the Fifth Circuit did express the view that properly supported allegations of union racial discrimination may be raised as a defense to a refusal to bargain complaint. That statement was dictum, however, because the court of appeals agreed with the Board that the employer had failed to submit adequate evidence of racial discrimination to overcome a motion for summary judgment. 607 F.2d at 1123-1124. Accord: *Skyline Corp.* v. *NLRB*, 613 F.2d 1328, 1335 & n.4 (5th Cir. 1980) (Pet. 19).[8]

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tion process, see *Handy Andy*, 228 N.L.R.B. at 454, which would be likely if the union's constitution or by-laws expressly required discrimination.

[8] In two pre-*Handy Andy* decisions cited by petitioner (Pet. 17-18), the Fifth Circuit likewise found that the employers had not made a prima facie showing of union racial discrimination that would warrant an evidentiary hearing on their allegations. See *NLRB* v. *Bancroft Mfg. Co.*, 516 F.2d 436,

It is true that the Eighth Circuit in *NLRB* v. *Mansion House Center Management Corp.*, 473 F.2d 471 (1973) (Pet. 16), concluded that "constitutional limitations on the Board's process require recognition of a charge of racial discrimination as an appropriate ground of inquiry where a union's representative capacity is questioned." 473 F.2d at 474. The basis of that holding was the court's belief that "[f]ederal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimatizes and perpetuates such invidious practices." *Id.* at 477. In our view, the Eighth Circuit's constitutional analysis is incorrect. As the Board made clear in *Handy Andy*, it does not approve of past union discrimination, or license the union to engage in it in the future, by certifying the union as representative. This Court's decisions also make clear that the government's involvement in certifying the union is not tantamount to endorsing all prior actions of the union. Cf. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982) (government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]").

Although the Eighth Circuit's decision is at odds with the decisions of other courts, that court has had no occasion to reconsider its holding in *Mansion*

446-447 (1975), cert. denied, 424 U.S. 914 (1976); *NLRB* v. *Sumter Plywood Corp.*, 535 F.2d 917, 929-931 (1976), cert. denied, 429 U.S. 1092 (1977). Moreover, in *Sumter* the court said only that union racial discrimination "can be a proper issue for the Board to consider" (535 F.2d at 930), not that the Board *must* consider it at the certification stage.

House in the nearly 20 years since the decision was issued. If the issue arises again, the Eighth Circuit may well resolve it differently, in light of the Board's subsequent decision in *Handy Andy*, the D.C. Circuit's analysis in *Bell & Howell*, and developments in state action jurisprudence. Given that the issue does not arise frequently, and the conflict may well be resolved without this Court's intervention, we do not believe that this Court's review is warranted.

2. Petitioner contends (Pet. 24-34) that the court of appeals erred when it denied petitioner's motion to require the Board to submit to the court all of the evidence that the Regional Director considered in dismissing petitioner's election objections. The court of appeals, however, expressly declined to reach "the merits" of that issue, because it held that petitioner had failed to present it to the Board. Pet. App. A16, citing *Van Leer Containers, Inc.* v. *NLRB*, 841 F.2d 779, 782-783 (7th Cir. 1988); *NLRB* v. *Browning-Ferris Industries of Louisville, Inc.*, 803 F.2d 345, 350 (7th Cir. 1986); *NLRB* v. *Affiliated Midwest Hospital, Inc.*, 789 F.2d 524, 533 (7th Cir. 1986). Because the court of appeals relied on petitioner's waiver without addressing the merits of its motion, this case does not squarely present the issue of petitioner's disagreement with the Board's policy on the composition of the administrative record.[9] The issue

[9] Several circuits have criticized the Board's policy, but petitioner would not prevail even under the approach adopted in those circuits. For example, in *NLRB* v. *West Coast Liquidators, Inc.*, 725 F.2d 532 (9th Cir. 1984) (Pet. 26), the court disapproved the Board's policy of excluding employee affidavits from the administrative record. 725 F.2d at 535. The court added, however, that it would not remand a case to the Board "merely because the Regional Director fails to forward all evidence he relied upon in his report" when, "even

it presents is whether the court of appeals properly ruled that petitioner waived its objection to the scope of the administrative record. That claim does not warrant this Court's review.

a. Under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts of appeals lack jurisdiction to con-

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assuming the truth of the employer's allegations, there was no reason to overturn the election," *id.* at 535 n.2, which is the case here. Similarly, in *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 357-359 (6th Cir. 1983) (Pet. 26), the court disapproved the Board's policy but explained that "if the objector's allegations would not warrant a new election even if true, the objector has not been prejudiced," 716 F.2d at 356; the effect of the Board's policy in judicial proceedings is to "relieve[] the objector of its general obligation to provide detailed factual support for his assertions and [to] require[] [the] court to give the objector the benefit of all favorable inferences." *Id.* at 358 n.14. In *NLRB* v. *Klingler Electric Corp.*, 656 F.2d 76 (5th Cir. 1981) (Pet. 26), the court interpreted the Board's former rule to require inclusion in the administrative record of witness statements relied upon by the Regional Director. 656 F.2d at 83. The court added, however, that, if the Regional Director rejected objections solely on the ground that the objector had not presented a prima facie case, the Board is not required to include in the record material other than that presented by the objector. *Id.* at 81-82. In *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980) (Pet. 27), the court found that the Board had "failed to comply with its own regulations" (622 F.2d at 1197) in requiring the objector to append the material it submitted to the Board on review, rather than requiring the Director to submit the material he considered in dismissing the objections. *Id.* at 1198-1199. Subsequently, in *National Posters, Inc.* v. *NLRB*, 720 F.2d 1358, 1361-1362 (1983) (Pet. 27 n.9), which involved the current Board rule, the Fourth Circuit held that an employer could not complain about the absence from the record of affidavits it had submitted to the Regional Director but had not then appended to its exceptions, as the rule required.

sider claims that were not urged before the Board, unless the failure to object to the Board is excused by "extraordinary circumstances." *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). In this case, petitioner challenges the fact that the Board did not require inclusion in the administrative record of witness statements gathered by the Regional Director in the course of his investigation of petitioner's objections to the election. See *Summa Corp.*, 265 N.L.R.B. 343 (1982), enforced, 734 F.2d 21 (9th Cir. 1984) (Table); 29 C.F.R. 102.69(g)(1)(ii).[10] Petitioner never asked the Board to supplement the record, however. Nor did petitioner give the Board "the opportunity to interpret its rule [governing the exclusion of witness statements]—and to attempt to justify it—in the concrete circumstances of this case before the matter

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[10] In *Summa Corp.*, the Board clarified that under its revised rule (29 C.F.R. 102.69(g)(1)(ii)), in election cases that do not involve a hearing, witness statements obtained by the Regional Director as part of his investigation are not included in the record transmitted to the Board. The Board stated that witness statements are excluded "in accord with our policy, upheld * * * in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), of protecting investigatory affidavits from disclosure." 263 N.L.R.B. at 343. The Board also explained that "the burden is on the objecting party to demonstrate to the Board that the evidence it submitted to the Regional Director, if credited, would warrant setting aside the election." *Ibid.* Accordingly, the Board held that it could review the Regional Director's determination that the objecting party had not sustained its burden on the basis of the evidence presented by that party. *Id.* at 343-344.

was presented" to the court of appeals. Pet. App. A17.

Petitioner asserts (Pet. 30-31) that Section 10(e) is not applicable here because the scope of the record before the court of appeals is not a matter for the Board to determine. That attempt to reformulate the issue is misguided. The Board overruled petitioner's objections to the election without a hearing, and without considering the witness statements gathered by the Regional Director. In attacking the Board's order in the court of appeals, petitioner's challenge raised the issue of whether the Board abused its discretion in denying petitioner a hearing based on the administrative record forwarded by the Regional Director. That issue did not require the court to make its own evaluation of whether a hearing was required, but to determine whether the *Board* erred in failing to require the witness statements to be included in the record before concluding that a hearing was unnecessary. Accordingly, the issue of the state of the record was one that petitioner should have raised before the Board prior to presenting it in court.

Nor is this a case calling for application of the "extraordinary circumstances" exception to Section 10(e). Petitioner suggests (Pet. 31) that an objection before the Board would have been futile in light of the Board's rules and practice, but the perceived futility of raising an issue does not overcome the jurisdictional bar imposed by Section 10(e). See *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) ("Repetition of the objection * * * might lead to a change of policy, or, at least [serve as] notice of the accumulating risk of wholesale reversals being incurred by [the agency's] persist-

ence.").[11] Petitioner states (Pet. 31-32) that it could not have raised its objection in the representation proceeding because changes in the Board's rules can be accomplished only through a rulemaking proceeding. The Board, however, has broad latitude to interpret its rules in the context of a particular proceeding, especially when dealing with rules that govern only its internal procedures, a subject that does not implicate the full panoply of notice-and-comment rulemaking procedures. See 5 U.S.C. 553(b)(3)(A) (APA rulemaking procedures are inapplicable "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice").

b. Even if petitioner were correct in contending that the interview statements gathered by the Regional Director should have been included in the administrative record, it would not affect the outcome of this case. The court of appeals explained that, accepting petitioner's submissions as true, petitioner "proffered no specific evidence of conduct sufficient to set aside the election."

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[11] But see *Kitchen Fresh, Inc.* v. *NLRB*, 716 F.2d 351, 356-358 (6th Cir. 1983) (holding that Section 10(e) did not bar a challenge to the absence from the administrative record of witness statements because an objection before the Board would have been futile). Under the Board's prior rule, some courts waived the Section 10(e) bar because of the conclusion that the rule's definition of the administrative record was ambiguous. See *NLRB* v. *Advanced Systems*, 681 F.2d 570, 574-575 (9th Cir. 1982); *NLRB* v. *Cambridge Wire Cloth Co.*, 622 F.2d 1195 (4th Cir. 1980). Those cases, however, afford no comfort for petitioner's claim (Pet. 32-33) of lack of notice. The Board's current rule, and its interpretation of it in *Summa Corp.*, plainly put petitioner on notice of the Board's policy.

> [O]ur review of the record indicates that the hearing officer accepted as true the Company's allegations, but considered these allegations insufficient to set aside the election. The Company's contention that employees feared losing their pension rights was accepted as true, but found insufficient to warrant an evidentiary hearing because these employee fears were not attributable to any statement made by the Union; the Company's contention that a union steward threatened employees with "blackballing" was accepted as true, but found insufficient to invalidate the election because these threats were temporally distant from the election and had not been disseminated to other employees; the Company's allegation that the Union issued apprenticeship cards was accepted as true, but found insufficient to overturn the election because these cards were issued pursuant to established practice.

Pet. App. A10.[12] In short, petitioner's "allegations did not meet *its* burden to point to "substantial" and

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[12] Petitioner's contention (Pet. 25-27) that the court of appeals relied on material not of record to enforce the Board's order is wide of the mark. At most, the court took into account that the Regional Director had found from his interviews that it was consistent with the Union's past practice to issue "B" apprentice cards to three apprentices. Pet. App. A9; Pet. App. A43-A46. Yet the court's conclusion did not rest on that evidence, but on the fact that *petitioner* "has not presented evidence that the Union issued apprentice cards outside the 'normal course of business' in order to influence the vote in the election." Pet. App. A9, quoting *St. Francis Federation of Nurses & Health Professionals* v. *NLRB*, 729 F.2d 844, 850 (D.C. Cir. 1984). It was petitioner's burden to offer such evidence, and mere speculation about the reasons for the Union's action is not sufficient.

material fact[s]" warranting a hearing on whether the election was tainted. 29 C.F.R. 102.69(d). Petitioner's quarrel with that finding (Pet. 27-29) raises a factbound issue that does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate Geenral Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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